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2724

No. 13215

United States
Court of Appeals
for the Ninth Circuit

ALBERT A. MAYER and R. D. TEMBREULL,
Appellants,

vs.

WILLIAM J. STEINERT, Trustee in Bankruptcy of McHugh Trucking Company, a limited partnership, and James E. McHugh, General Partner, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Western District of Washington,
Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

J. LAEL SIMMONS,

Attorney for Appellant,

Northern Life Tower,
Seattle 1, Washington.

NELSON R. ANDERSON,

Attorney for Appellee,

1207 American Building,
Seattle 1, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division

In Bankruptcy—No. 38376

In the Matter of

McHUGH TRUCKING COMPANY, a limited partnership, and JAMES E. McHUGH, General Partner,

Alleged Bankrupt.

CREDITORS' PETITION

To the Honorable Lloyd L. Black, Judge of the District Court of the United States for the Western District of Washington, Northern Division:

The petition of Albert Mayer of 626 13th Avenue, North, Seattle, Washington, and R. D. Tambruell of 626 13th Avenue North, Seattle, Washington, and J. Lael Simmons, 1501 Northern Life Tower, Seattle, Washington, respectfully represents:

I.

That McHugh Trucking Company is a limited partnership with its principal place of business at Seattle, Washington, for the larger portion of six months immediately preceding the filing of this petition in the above judicial district. That a copy of its certificate of partnership is hereto attached marked Exhibit A and by reference included in this petition.

II.

That said partnership is engaged in the general freighting, hauling and trucking business.

III.

That said partnership owes debts in excess of $1,000.00. That it has creditors in excess of twelve (12) in number, that the exact amount of its indebtedness and the names and addresses of its creditors are not presently known to petitioners but that your petitioners have provable claims against said partnership.

IV.

That the provable claims of your petitioners, fixed as to liability and liquidated in amount, aggregate in excess of the value of securities held by them, more than $500.00. The nature and amount of your petitioners claims are as follows:

J. Lael Simmons: Professional services and cash	$ 568.80
Albert Mayer Cash loaned	11,611.19
R. D. Tembruell Cash loaned	11,611.19

V.

That said partnership is insolvent and unable to pay its debts in the ordinary course of business or at all and within four months next preceding the filing of this petition has committed an act of bankruptcy in that on September 30, 1949, or thereabouts, it did cause to be paid to the order of E. B. Harold the sum of $400.00 for the private account of the general partner, James E. McHugh. That the transfer of said funds was during insolvency and

while said general partner was overdrawn on his account with the partnership and constitutes a preference as to other creditors including your petitioners.

VI.

That within four months next preceding the filing of this petition the said general partner and the partnership have committed further acts of bankruptcy in that the National Bank of Commerce of Seattle, Washington, has, through legal proceedings, obtained the equity of the partnership in and to certain personal property consisting of a 1948 Federal Truck and Tractor, Model 45M, Motor No. T-6427-2336, Serial No. 145965, and a Thomas low bed trailer, Serial No. 1070, and that the foreclosure on the said equipment constitutes a preference as to said creditors as may be more fully ascertained from the records and files of Yakima County, Washington, Superior Court Cause No. 36046.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon said McHugh Trucking Company, a limited partnership, and James E. McHugh, general partner, as provided in the Act of Congress relating to bankruptcy, and that said partnership and said general partner be adjudged to be a bankrupt within the purview of said Act.

/s/ J. LAEL SIMMONS,
/s/ ALBERT MAYER,
/s/ R. D. TEMBREULL.

State of Washington,
County of King—ss.

J. Lael Simmons, Albert Mayer and R. D. Tembruell, being first duly sworn on oath, each for himself, depose and say: That I am one of the petitioners herein, that I have read the foregoing Petition, and know the contents thereof and believe the same to be true.

/s/ J. LAEL SIMMONS,
/s/ ALBERT MAYER,
/s/ R. D. TEMBRUELL.

Subscribed and Sworn to before me this 20th day of January, 1950.

[Seal] /s/ RICHARD G. McCANN,
Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT A

CERTIFICATE OF LIMITED PARTNERSHIP

Know All Men By These Presents: That James McHugh, Albert Mayer and R. D. Tembreull, being desirous of forming a limited partnership have associated themselves together in the following manner and upon being first duly sworn on oath do hereby certify, swear and state:

I.

That the name of the limited partnership shall be McHugh Trucking Co.

II.

That the purpose and character of said business shall be the operation of a general dealership, trucking, hauling and freighting business and to do all things incidental and consequential to carrying on said business.

III.

That the location of the principal place of business shall be Seattle, Washington.

IV.

That the name, place of residence and designation of each of the partners in this business are as follows:

1. James McHugh; General Partner. 552 25th Avenue, Seattle, Washington.

2. Albert Mayer; Limited Partner. 626 13th Avenue N., Seattle, Washington.

3. R. D. Tembreull; Limited Partner. 626 13th Avenue N., Seattle, Washington.

V.

The term of existence of this partnership shall be for one (1) year, unless sooner terminated by the agreement of the partners. At the end of one year, or sooner, it is agreed that the partnership shall be terminated and the assets of the partnership shall be turned over to a corporation to be formed by the members to carry on said business and that

each of the partners shall have one-third (⅓) of the initial issue of the stock in said corporation for his interest.

VI.

The total capital of the partnership shall be Four Thousand Five Hundred ($4,500.00) Dollars, the composition of which is as follows:

James McHugh to assign to the partnership his dealership and all trucking permits which have the agreed value of $1,500.00;

Albert Mayer to contribute the sum of $1,500.00 in cash; and

R. D. Tembreull to contribute the sum of $1,500.00 in cash.

VII.

No additional contributions may be required of the limited partners.

VIII.

Each partner whether limited or general shall receive his one-third of the stock when this partnership is organized into a corporation, and in the event that this partnership is dissolved by agreement and no corporation organized, then each partner whether limited or otherwise shall receive one-third of the net assets. In addition thereto, the general partner shall receive such additional compensation for the operation of the business as all the partners may agree upon.

IX.

Each partner whether limited or general shall receive one-third of the net profits of the partnership.

X.

No right of substitution shall exist during the term of this partnership.

XI.

No additional partners shall be admitted to the partnership without the unanimous consent of all the partners, both general and limited.

XII.

No priority as to compensation shall exist between the limited partners.

XIII.

In the event of the death, retirement or insanity of the general partner, the partnership shall be dissolved and its business wound up and the contributions of the limited partners returned to them. The death of a limited partner, however, shall not dissolve the partnership but shall entitle his heirs or representatives to the return of his contribution.

XIV.

Books of account shall be kept by or under the directions of the general partner, subject to inspection at all reasonable times by any limited partner.

XV.

Checks on the partnership accounts shall be signed by the general partner and either of the limited partners.

XVI.

The plan of this limited partnership calls for the eventual incorporation of this business as hereinbefore set out, and each partner, both limited and general, is to receive one-third of the initial issue of the stock in the corporation. However, in the event the partnership is dissolved by mutual agreement prior to that time, then each of the limited partners shall receive cash for his contribution and cannot demand and receive some specific property.

/s/ JAMES E. McHUGH,
General Partner.

/s/ R. D. TEMBREULL,
Limited Partner.

/s/ ALBERT A. MAYER,
Limited Partner.

State of Washington,
County of King—ss.

On this day personally appeared before me James McHugh, Albert Mayer and R. D. Tembreull, to be known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their

free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 23rd day of June, 1948.

[Seal] /s/ RICHARD G. McCANN,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

ANSWER TO CREDITORS' PETITION

Said James E. McHugh answers the creditors' petition herein as follows:

I.

Answering paragraph I of said petition, he denies each and every allegation therein contained and the whole thereof.

II.

Answering paragraph II thereof, he admits the same.

III.

Answering paragraph III thereof, he admits that the partnership owes debts to the amount of $1,000.00 and more and that there may be more than twelve (12) creditors of the bankrupt partnership, but denies each and every other allegation therein contained and the whole thereof.

IV.

Answering paragraph IV thereof, he denies each and every allegation therein contained and the whole thereof.

V.

Answering paragraph 5 thereof, he denies the same and alleges that said Tembruell and Mayer must have property or money of the partnership, which may be sufficient to consider it solvent.

VI.

Answering paragraph VI thereof, he denies the same.

Wherefore, your respondent prays that a hearing be had on said petition and this answer, and that the issues presented thereby be determined by a jury.

/s/ JAMES E. McHUGH.

Duly Verified.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Seattle, in said district, on the 29th day of March, 1950.

The petition of R. D. Tembruell, Albert A. Mayer and J. Lael Simmons, filed on the 20th day of January, 1950, that the McHugh Trucking Company,

Ltd., a limited partnership and James E. McHugh, as general partner be jointly adjudged bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered, and said petition having been opposed by James E. McHugh; and the issues presented by the pleadings having been tried and determined by the court, and after hearing J. Lael Simmons, attorney for said petitioners, in favor of said petition, and Russell W. Newman, attorney for said alleged bankrupts, in opposition thereto;

Now upon the said petition, verified the 20th day of January, 1950, and the answer of James E. McHugh, verified the 27th day of January, 1950, and it having found that the material facts alleged in said petition were proved, it is

Adjudged that said McHugh Trucking Company, Ltd., a limited partnership, and James E. McHugh, general partner, jointly are and each of them is bankrupt under the Act of Congress relating to bankruptcy.

This adjudication is without prejudice to rights of any creditor or trustee against R. D. Tembruell, or Albert A. Mayer alleged limited partners.

/s/ LLOYD L. BLACK,
District Judge.

OK as to form and notice of presentation waived 3/29/50.

/s/ LEE L. NEWMAN,
Of Counsel.

[Endorsed]: Filed March 29, 1950.

[Title of District Court and Cause.]

ORDER OF REFERENCE

At Seattle in said District on the 29th day of March, 1950, McHugh Trucking Company, a limited partnership and James E. McHugh, general partner, were jointly and each of them was adjudged bankrupt under the Acts of Congress relating to bankruptcy. Now therefore, it is hereby

Ordered that the above entitled proceeding be and it hereby is referred to the Honorable Van C. Griffin, one of the Referees in Bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act and that the said bankrupt shall henceforth attend before the said referee and submit to such orders as may be made by him or by a judge of this Court relating to said bankruptcy.

Done in open Court this 5th day of April, 1950.

/s/ LLOYD L. BLACK,
District Judge.

Presented by:

/s/ MILLARD P. THOMAS,
Clerk, U. S. District Court.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

ORAL DECISION BY JUDGE BLACK

March 24, 1950.

The Court: I am ready to rule. The partnership known as McHugh Trucking Company, the alleged bankrupt, is and since at least October 22, 1949 has been hopelessly insolvent as a partnership. It is and since at least October 22, 1949 has been unable to pay its bills or obligations. Within four months last past acts of bankruptcy have been suffered by the partnership. As of necessity the partnership is adjudicated bankrupt and will be referred to Van C. Griffin, Referee in Bankruptcy, at Seattle, Washington for appropriate proceedings.

As between Mr. McHugh and Mr. Tembreull and Mr. Mayer it would appear that the partnership is a limited partnership as to Mr. Mayer and Mr. Tembreull and that McHugh is and has been the general partner. What the status of the liability of Mr. Tembreull and Mr. Mayer may be with respect to creditors of the partnership is not being determined by me at this time. The creditors in this bankruptcy proceeding are to be entitled to such rights, if any, as they may have against Mr. Tembreull and Mr. Mayer. The Trustee to be appointed in bankruptcy of this partnership is to have such rights, if any, as under the facts and the law he may have against Mr. Tembreull and Mr. Mayer.

I am not indicating by this that Mr. Mayer or Mr. Tembreull or either of them have any liability

to any creditors other than such as they in writing specially assumed as to some special creditor or creditors. I am not indicating that they do not have liability in some degree to some or all of the creditors. I am not indicating that they are or are not as against creditors or some of them estopped to deny that they became general partners.

I may say that the attitude of Mr. McHugh in this proceeding as it appears to me is one, unfortunately, which is too frequently the attitude of an individual who has received many financial benefits and aids from someone and then thereafter seeks to repay them by most regrettable ingratitude. In any event, under this evidence Mr. Mayer and Mr. Tembreull have lost thousands of dollars. In any event, under the evidence Mr. McHugh has lost nothing. In any event, under the evidence as presented to me Mr. McHugh has endeavored to make Mr. Mayer and Mr. Tembreull lose many more thousands of dollars, all, so far as I can see, because they were foolish enough to believe that he had the ability to run this business. But he is not the first person, and, unfortunately, will not be the last one who has sought to repay financial aid by an attempt to financially injure those who tried to help him.

But whatever may be the equities as between Mr. McHugh on the one hand and Mr. Mayer and Mr. Tembreull on the other, the Court will have to consider the rights of creditors. Mr. Tembreull and Mr. Mayer may be more protected than the creditors or some of them are going to claim. It may prove to

be the fact ultimately that they have lost a lot more money than the amounts they have already advanced.

* * * * *

[Endorsed]: Filed July 24, 1950.

[Title of District Court and Cause.]

SPECIAL APPEARANCE

Come Now R. D. Tembreull and Albert Mayer and appearing specially herein, object to the jurisdiction of the Referee.

/s/ SIMMONS & McCANN,
Attorneys for Mayer and
Tembreull.

Acknowledgment of Service attached.

[Endorsed]: Filed December 18, 1950.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable John C. Bowen, United States District Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of this proceeding do hereby certify:

Albert Mayer and R. D. Tembruell and J. Lael Simmons filed a Creditors' Petition against Mc-

Hugh Trucking Company, a limited partnership, and James E. McHugh, General Partner, alleging therein that the said partnership was insolvent and was indebted to them as follows:

J. Lael Simmons: Professional services and cash	$ 568.80
Albert Mayer: Cash loaned	11,611.19
R. D. Tembruell: Cash loaned	11,611.19

The Petition further alleged that McHugh Trucking Company is a limited partnership based upon a contract attached to said Petition and that James E. McHugh was a general partner and Albert Mayer and R. D. Tembruell were limited partners. Subpoenas were issued and served upon no creditor but only upon James E. McHugh. After hearing an Order of Adjudication of Bankruptcy was entered containing the following language:

"Adjudged that said McHugh Trucking Company Lt., a limited partnership, and James E. McHugh, general partner, jointly are and each of them is bankrupt under the Act of Congress relating to bankruptcy.

"This adjudication is without prejudice to rights of any creditor or trustee against R. D. Tembruell, or Albert A. Mayer alleged limited partners.

/s/ LLOYD L. BLACK,
District Judge.

"O.K. as to form and notice of presentation waived 3/29/50.

LEE L. NEWMAN,
Of Counsel."

Pursuant to an Order by this Referee after the matter had been referred to him by general Order of Reference, James E. McHugh filed his Statement of Affairs in which he stated, in answer to paragraphs 14 and 15, that R. D. Tembruell, Albert Mayer and James E. McHugh were all general partners and that the withdrawal by Tembruell and Mayer contributed to the bankruptcy of the partnership and the schedules filed indicated that if certain obligations were against the partnership, they were incurred by Mayer and Tembruell.

On December 7, 1950, the Honorable William J. Steinert duly qualified as Trustee herein and filed his Petition setting forth that the contract of limited partnership was not filed until after the scheduled indebtedness had been incurred and until April 20, 1949, and that Albert Mayer and R. D. Tembruell were, in fact, general partners and each exercised control over the business of said partnership, and upon that Petition the Referee entered an Order for Examination of Albert Mayer and R. D. Tembruell and directing them to show cause, if any, why they should not be required and ordered to file bankruptcy schedules of assets and liabilities as provided by the Bankruptcy Act, and in response to that Order they did appear, a hearing was had, they and the Trustee produced oral and documentary evidence and at the conclusion of the hearing the Referee entered an Order on January 29, 1951, directing Albert Mayer and R. D. Tembruell to file bankruptcy schedules herein. Albert Mayer and R. D. Tembruell filed Objections to the

Order and on February 7, 1951, filed herein their Petition for Review of said Order directing them to file schedules in bankruptcy.

Statement of Questions Presented

From the evidence the Referee found as a fact that Albert Mayer and R. D. Tembruell personally participated in the management and control and the incurring of obligations of the McHugh Trucking Company, that the principal bank account was under their control, another bank account under their control jointly with McHugh, that the secured indebtedness and the partially secured indebtedness and much of the unsecured indebtedness was incurred by them before the filing of the contract of limited partnership, that the main office of the McHugh Trucking Company for a while was at their residence. The Referee decided these acts made them general partners.

The Referee decided as a matter of law that the provision in paragraph XV of the Certificate of Limited Partnership (copy attached to Petition; also, certified photostatic copy in Exhibit file), to-wit:

> "Checks on the partnership accounts shall be signed by the general partner and either of the limited partners."

deprived the persons named as limited partners of the protection of the provisions of the Limited Partnership Act, Section 9975-7, which states:

"A limited partner shall not become liable as a general partner unless he, in addition to the exercise of his rights and powers as a limited partner, takes part in the control of the business."

The Referee concluded that the control of the bank accounts is a control of a vital part of the business.

The Uniform Limited Partnership Act, being Section 9975-2, provides for the filing of the contract or certificate of record in the office of the County Clerk and in this case it was proved and admitted that this was not done until long after much of the indebtedness was incurred when, of course, the filing would be futile as to existing creditors.

The Referee, having decided that the parties, Albert Mayer and R. D. Tembruell, were in fact general partners, based his authority to direct them to file schedules in the Order entered by him on January 29, 1951, upon the following authorities:

In Re Sugar Valley Gin Co., 4 A.B.R. (N.S.) 140, 292 Fed. 508

the court held that the individual parties as components of the partnership should be required to file schedules of their individual assets and liabilities.

Remington on Bankruptcy, Vol. 1, Sec. 73:

"Where only the firm is adjudicated bankrupt, and none of the individual members, or not all of them, also, the estates of the individual mem-

bers, nevertheless, are involved and are to be administered in the bankruptcy."

Volume 1 in Collier on Bankruptcy (14th Ed.), p. 714, Sec. 5:19:

"The trustee of a partnership may take possession of and administer the property of an unadjudicated partner, so far as is necessary to settle the partnership estate."

Also, 1949 Supplement of Collier on Bankruptcy, page 721.

Remington, Vol. 6, Section 2887:

First National Bank of Herkimer v. Poland Union, 42 A.B.R. (N.S.) 99 109 Fed. (2) 54.

Francis v. McNeal, 228 U.S. 695.

Kaufman Brown Potatoe Co. v. Long, 9th Circuit, May 11, 1950, No. 12390.

Papers Transmitted

1. Trustee's Petition, December 7, 1950.

2. Order for Examination of Bankrupt and Order to Show Cause signed December 13, 1950.

3. Order directing Albert Mayer and R. D. Tembruell to file bankruptcy schedules, dated January 29, 1951.

4. Petition of Albert Mayer and R. D. Tembruell for Review, filed February 7, 1951.

5. Transcript of Hearing on Order to Show Cause, filed February 28, 1951, together with the following Exhibits:

(1) Trustee's Exhibit No. 1, signature card—Seattle First National Bank.

(2) Trustee's Exhibit No. 2, claim of Seattle First National Bank.

(3) Trustee's Exhibit No. 3, being cancelled checks and ledger sheets.

(4) Trustee's Exhibit No. 4, Combined Authority, Individual Guaranty and Pledge Agreements for Partnerships (Seattle First National Bank).

(5) Trustee's Exhibit No. 5, Auditor's Report.

Dated at Seattle, Washington, this 3rd day of April, 1951.

Respectfully submitted,

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed April 4, 1951.

[Title of District Court and Cause.]

PETITION AND REPORT OF TRUSTEE

Comes now William J. Steinert as trustee of the above named bankrupt, and respectfully shows the court:

I.

That since October 30, 1950, William J. Steinert has been, and now is, the duly appointed, qualified and acting trustee of the above named bankrupt.

II.

That James McHugh, Albert Mayer and R. D. Tembreull, on or about the 23rd day of June, 1948, entered into a purported limited partnership agreement; that the above entitled court on March 29, 1950, adjudicated that McHugh Trucking Company, a limited partnership, and James T. McHugh jointly are and each of them is bankrupt; that said adjudication was based upon a petition filed by Albert Mayer, R. D. Tembreull and Leal Simmons allegeding that Albert Mayer and R. D. Tembreull were limited partners and that James McHugh was a general partner; that in truth and in fact said Albert Mayer, R. D. Tembreull and James McHugh were general partners doing business as McHugh Trucking Company; that each of said partners exercised control over the business of said partnership and that said certificate of limited partnership was not filed with the Clerk of King County until April 20, 1949, and that the indebtedness contracted by said partnership was all contracted prior to April 20, 1949.

III.

That the estate herein owns one 1945 International Truck and Trailer; that same was heretofore appraised by Leo C. Kendrick on August 23, 1950, in the sum of $4,500.00; that the trustee believes that said sum was excessive and is informed that the motor has been torn out; that three wheels and three tires are missing; that said truck has been stored with Redmon-Fairchild, Inc., 302 South 4th

Avenue, Yakima, Washington; that the trustee believes that said truck and trailer should be reappraised and its real value determined.

IV.

That said truck and trailer has heretofore been determined to be partnership property and non-exempt.

V.

That said truck and trailer should be offered for sale to the highest and best bidder for cash and that for the best interests of the estate herein said sale be made at private sale, subject to the approval of the court.

VI.

That James McHugh, bankrupt, should be further examined as a bankrupt with reference to missing parts of said equipment and with reference to other assets of the bankrupt estate.

VII.

That Albert Mayer and R. D. Tembreull should be required to show cause, if any, why they should not be held to be general partners of James McHugh, doing business as McHugh Trucking Company, and file schedules of their assets and liabilities in the above entitled estate.

Wherefore, petitioner prays the court that a meeting of the creditors herein be called and that at said meeting James McHugh be re-examined as a bankrupt; that Albert Mayer and R. D. Tembreull be

ordered to show cause why they should not be held and determined to be general partners with James McHugh in the firm of McHugh Trucking Company, and to file schedules of their assets and liabilities herein as required by law and that a sale be had of the 1945 International Truck and Trailer and for the transaction of such other and further business as may properly come before the meeting.

/s/ WILLIAM J. STEINERT,
Petitioner.

Duly Verified.

[Endorsed]: Filed December 7, 1950.

[Title of District Court and Cause.]

ORDER FOR EXAMINATION OF BANKRUPT AND ORDER TO SHOW CAUSE

The petition and report of the trustee coming on regularly for hearing and it appearing that a meeting of the creditors of the above named bankrupt should be called, that the bankrupt McHugh should be examined and that an order to show cause should issue to Albert Mayer and R. D. Tembreull as hereinafter provided, the court being fully advised in the premises,

It Is Hereby Ordered that James McHugh, bankrupt, be and he is hereby ordered and directed to be and appear before the undersigned Referee at his office 600 Federal Court House, Seattle, Washington, on the 19th day of December, 1950, at 2:30 o'clock p.m., for examination.

It Is Further Ordered that Albert Mayer and R. D. Tembreull be and they each are hereby ordered and directed to be and appear before the undersigned Referee in Bankruptcy at his office 600 Federal Court House, Seattle, Washington, on the 19th day of December, 1950, at 2:30 o'clock p.m. for examination and then and there to show cause, if any, why they and each of them should not be held and decreed to be general partners with James McHugh, bankrupt, in that certain partnership known and described as McHugh Trucking Company, and further to show cause, if any, why they should not be required and ordered to file bankruptcy schedules of assets and liabilities as provided in the Bankruptcy Act.

Dated at Seattle, Washington, this 13th day of December, 1950.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed December 14, 1950.

[Title of District Court and Cause.]

ORDER DIRECTING ALBERT MAYER AND R. D. TEMBREULL TO FILE BANKRUPTCY SCHEDULES

This matter coming on regularly for hearing before the Hon. Van C. Griffin, Referee in Bankruptcy, upon an order for examination of the bankrupt and examination of Albert Mayer and R. D. Tembreull and to show cause, if any, why the said Albert Mayer and R. D. Tembreull should not be held and decreed to be general partners with James McHugh, bankrupt, in that certain partnership known and described as McHugh Trucking Company, and further to show cause why they should not be required and ordered to file bankruptcy schedules of assets and liabilities as provided in the Bankruptcy Act on the 19th day of December, 1950, and the hearing thereon having been continued to January 12, 1951, when said matter was called for a hearing and there appeared William J. Steinert, Trustee, and Nelson R. Anderson, as his attorney, Albert Mayer and R. D. Tembreull and Simmons & McCann, their attorneys, James McHugh and J. Vernon Clemens, his attorney, and the Referee having considered the special appearances of Albert Mayer and R. D. Tembreull objecting to the jurisdiction of the Referee and having overruled said objections, and having heard certain admissions and certain denials of the said Albert Mayer and R. D. Tembreull to the petition of the trustee herein on which the show cause order was

based and having heard the evidence offered herein, finds that James McHugh, Albert Mayer and R. D. Tembreull entered into a partnership agreement on June 13, 1948, denominated by them as a limited partnership and that said parties did not file said agreement with the Clerk of King County, Washington, until April 20, 1949, and that in the interim a material part of the indebtedness contracted by said partnership was incurred and remains unpaid; that said Mayer and said Tembreull opened a general checking account in the Seattle First National Bank wherein were deposited funds of said partnership; that said Mayer and said Tembreull alone signed the signature card; that the said James McHugh's name did not appear on said signature card of said partnership and that he had no right, power or authority to sign any checks on said partnership account; that the funds entering into said partnership account and the funds disbursed out of said partnership account were under the exclusive possession and control of the said Mayer and the said Tembreull; that a loan on behalf of said partnership was contracted with said bank by said three partners and that a general promissory note executed by the three partners was delivered to said bank and that said note was secured by a chattel mortgage on trucks and equipment of said partnership and said chattel mortgage was executed by the three partners; that said three partners negotiated for the purchase of certain trucks from Philippine Produce Company and they purchased trucks from said company; that said Mayer and Tembreull employed an

accountant for said partnership and employed counsel for said partnership; participated in the hiring of drivers for said trucks; participated in the soliciting of business for said partnership and exercised control over said partnership and its business and operations and were limited partners only in name and were actual partners in fact, the court being fully advised in the premises,

It Is Hereby Ordered, Determined and Adjudicated That James McHugh, Albert Mayer and R. D. Tembreull, from the date of the formation of said partnership to the date of the adjudication herein, were and are now general partners doing business under the name and style of McHugh Trucking Company.

It Is Further Ordered that Albert Mayer and R. D. Tembreull be and they are hereby directed and commanded to file herein, within ten days, bankruptcy schedules, listing all assets and liabilities of each of them, in the form and content as prescribed by the Bankruptcy Act.

Dated at Seattle, Washington, this 29th day of January, 1951.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

Presented by:

/s/ NELSON R. ANDERSON,
Attorney for Trustee.

[Endorsed]: Filed January 29, 1951.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: Van C. Griffin, Esquire, Referee in Bankrutcy:

The petition of R. D. Tembreull and Albert A. Mayer, respectfully represents that:

1. Your petitioners are aggrieved by the order herein of Van C. Griffin, Referee in Bankruptcy, dated January 29, 1951, a copy of which order is annexed hereto marked Exhibit A and made a part hereof.

2. The Referee erred in overruling the special appearance of your petitioners, which special appearance was clearly well taken under the law.

3. The Referee erred in respect to said order in finding that a material part of the indebtedness contracted by the bankrupt partnership was incurred prior to April 20, 1949. The Referee further erred in not designating specific items and amounts that were allegedly incurred prior to said date without determining whether said indebtedness was incurred with knowledge or responsibility of the limited partners.

4. The Referee erred in holding the account in the Seattle First National Bank which was used by your petitioners to assist the limited partnership and the general partner, to be a partnership account. Said bank account under the proof consisted of funds voluntarily used by your petitioners to aid said partnership without any obligation whatsoever on the part of said petitioners so to do. The Referee erred further in holding that there was any

duty to include James McHugh's name as an authorized signature to checks drawn on said account.

5. Referee further erred in construing the credit of your petitioners as limited partners loaned to the partnership by signing a promissory note to the Seattle First National Bank as such control of the partnership as would change the character of petitioners from limited partners to general partners. The same error was committed by said Referee in respect to the transaction with the Philippine Produce Company.

6. The Referee further erred in holding that the nominating of a business accountant or attorney constituted such participation in control of the business and affairs of the corporation as to change the nature of petitioners from limited to general partners.

7. Referee further erred in presuming to adjudicate your petitioners as general partners in the McHugh Trucking Company.

8. In the absence of a petition for adjudication of petitioners as bankrupts and an order of adjudication by the court, the order of the Referee in directing or commanding your petitioners to file bankruptcy schedules herein is premature.

9. The order adjudging McHugh Trucking Company and James McHugh, General partner therein bankrupt was predicated upon a petition signed by your petitioners as limited partners and general unsecured creditors under the Acts of Congress relating to bankruptcies. To now hold your petitioners as general partners as to all creditors without lim-

itation and without designation is in effect to reverse the District Court and remove the footings from under the order of adjudication. It was error for the Referee to make an order with that effect.

Wherefore your petitioners pray that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said Order be reversed and that your petitioners have such other further and different relief as is just.

Dated at Seattle, Washington, this 7th day of February, 1951.

/s/ R. D. TEMBREULL,
/s/ ALBERT A. MAYER.

/s/ SIMMONS & McCANN,
Attorneys for Petitioners.

Acknowledgment of Service attached.

[Endorsed]: Filed February 7, 1951.

United States District Court, Western District of Washington, Northern Division

No. 38,376

In the Matter of

McHUGH TRUCKING COMPANY, a limited partnership, and JAMES E. McHUGH, General Partner,

Bankrupt.

ORDER

On the 6th day of July, 1951 this matter came on regularly to be heard before the undersigned United States District Judge, upon the petition of R. D. Tembreull and Albert A. Mayer for a review of the order of the Referee in Bankruptcy entered herein on the 29th day of January, 1951 determining that James McHugh, Albert Mayer and R. D. Tembreull were and are general partners doing business under the name and style of McHugh Trucking Company, and ordering Albert Mayer and R. D. Tembreull to file bankruptcy schedules listing all assets and liabilities of each of them; said R. D. Tembreull and Albert A. Mayer appearing by and through their attorneys, Simmons & McCann, and the Trustee, William J. Steinert, appearing by Nelson R. Anderson, his attorney, and the court having heard the argument of Nelson R. Anderson, attorney for the Trustee, and counsel for R. D. Tembreull and Albert A. Mayer having failed to appear, and the court having read the briefs filed herein on behalf of each party, and it appearing to the court and the court

finding from the evidence adduced before it and from the Referee's certificate and the record that R. D. Tembreull and Albert A. Mayer personally participated in such manner in the management and control of the business of the McHugh Trucking Company during the period of time involved herein so as to constitute them general partners; and

The court finding from the evidence and the argument and briefs of counsel, as aforesaid, that said R. D. Tembreull and Albert A. Mayer did so conduct themselves as to constitute them general partners along with James McHugh in the operation of the McHugh Trucking Company, and the court being otherwise fully advised in the premises,

Now Therefore, it is Ordered, Adjudged and Decreed that the order of the Referee in Bankruptcy directing R. D. Tembreull and Albert A. Mayer to file bankruptcy schedules as provided in said order, be, and the same is hereby, approved, ratified and confirmed.

Dated this 9th day of August, 1951.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed August 9, 1951.

United States District Court, Western District of Washington, Northern Division

No. 38,376

In the Matter of
McHUGH TRUCKING COMPANY, a limited partnership, and JAMES E. McHUGH, General Partner,

Bankrupt.

ORDER

On the 27th day of August, 1951, this matter came on regularly to be heard before the undersigned United States District Judge upon the motion of R. D. Tembreull and Albert A. Mayer for reconsideration, or in the alternative for re-hearing of this Court's Order dated the 9th day of August, 1951, which approved, ratified and confirmed the Referee in Bankruptcy's Order directing appellants to file bankruptcy schedules; this Court granted the motion for re-hearing and proceeded to hear the argument of counsel, J. Lael Simmons, representing R. D. Tembreull and Albert A. Mayer, and Nelson R. Anderson appearing as attorney for the trustee, William J. Steinert.

Upon completion of counsel's argument the undersigned Judge indicated that he would take the matter under advisement and inform counsel of his decision in open court on Tuesday, September 4, and in conformity with said oral decision, it is

Ordered, Adjudged and Decreed that this Court's Order dated the 9th day of August, 1951, which approved the Order of the Referee in Bankruptcy is hereby re-affirmed and confirmed without prejudice

to the rights of R. D. Tembreull and Albert A. Mayer to interpose such motions as the law allows against the original petition in bankruptcy under which the McHugh Trucking Company and James E. McHugh were adjudicated bankrupts.

Dated this 17th day of September, 1951.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ J. LAEL SIMMONS,
Attorney for R. D. Tembreull
and Albert A. Mayer.

Approved as to form:

/s/ NELSON R. ANDERSON,
Attorney for Trustee.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

The undersigned, R. D. Tembreull and Albert A. Mayer, appellants herein, and National Surety Corporation, surety, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars ($250.00), that the appellee may be put to or allowed if the appeal is dismissed or the judgment

affirmed, or such costs as the appellate court may award if the judgment is modified.

The said surety hereby irrevocably appoints the clerk of this court as his agent upon whom any papers affecting his liability on this undertaking may be served.

Signed, Sealed, and Delivered this 17th day of October, 1951.

/s/ R. D. TEMBREULL,
/s/ ALBERT A. MAYER,

/s/ By J. LAEL SIMMONS,
Attorney for Appellants.

[Seal] NATIONAL SURETY CORPORATION,

/s/ By RAYMOND C. WEISS,
Attorney-in-Fact.

[Endorsed]: Filed October 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William J. Steinert, Trustee in Bankruptcy, and Nelson R. Anderson, Attorney for Trustee:

Notice is given that Albert A. Mayer and R. D. Tembreull hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court dated September 17, 1951, which reaffirmed and confirmed its earlier Order dated August 9, 1951, which approved on ap-

peal the Order of the Referee in Bankruptcy dated January 29, 1951, which ruled that Albert A. Mayer and R. D. Tembreull, from the date of the formation of the McHugh Trucking Company to the date of the adjudication, were and now are general partners in said firm, and which further ordered Albert A. Mayer and R. D. Tembreull to file bankruptcy schedules listing all of the assets and liabilities of each of them.

Dated this 17th day of October, 1951.

/s/ J. LAEL SIMMONS,
Attorney for R. D. Tembreull
and Albert A. Mayer.

[Endorsed]: Filed October 17, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS PETITION IN BANKRUPTCY

The motion of R. D. Tembreull and Albert A. Mayer "to dismiss the petition in bankruptcy in this cause filed against McHugh Trucking Company and James E. McHugh insofar as it seeks to adjudicate the McHugh Trucking Company, a bankrupt" coming on regularly for hearing; J. Lael Simmons appearing for the moving parties, and Nelson R. Anderson appearing for William J. Steinert, Trustee in Bankruptcy, and the Court having considered the motion and the objections of

the Trustee thereto and having heard the arguments of counsel, and being fully advised, it is hereby

Ordered that the motion to dismiss filed by R. D. Tembreull and Albert A. Mayer be and the same hereby is denied.

Dated this 2nd day of November, 1951.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

MEMORANDUM

On the 29th day of March, 1950, after hearing before the Honorable Lloyd L. Black, since deceased, upon the petition of R. D. Tembreull, Albert A. Mayer and J. Lael Simmons, the McHugh Trucking Company, a limited partnership, and James E. McHugh, general partner, were adjudged bankrupt. The adjudication provided as follows:

"* * * it is

"Adjudged that said McHugh Trucking Company Ltd., a limited partnership, and James E. McHugh, general partner, jointly are and each of them is bankrupt under the Act of Congress relating to bankruptcy.

"This adjudication is without prejudice to rights of any creditor or trustee against R. D. Tembreull, or Albert A. Mayer alleged limited partners."

On the 5th day of April, 1950 the matter was referred to the Referee for further proceedings.

Thereafter, following a hearing before the Referee in Bankruptcy, it was determined that James McHugh, Albert Mayer and R. D. Tembreull were general partners doing business as the McHugh Trucking Company, and Mayer and Tembreull were directed to file bankruptcy schedules. The order was contained in the following language:

"It Is Hereby Ordered, Determined and Adjudicated That James McHugh, Albert Mayer and R. D. Tembreull, from the date of the formation of said partnership to the date of the adjudication herein, were and are now general partners doing business under the name and style of McHugh Trucking Company.

"It Is Further Ordered that Albert Mayer and R. D. Tembreull be and they are hereby directed and commanded to file herein, within ten days, bankruptcy schedules, listing all assets, and liabilities of each of them, in the form and content as prescribed by the Bankruptcy Act."

Tembreull and Mayer petitioned for a review of the order of the Referee, which order, after argument and presentation of briefs, was approved on August 9, 1951 by the undersigned Judge. Subsequently, upon motion of counsel for Tembreull and Mayer for a rehearing, the matter was again argued and the order entered August 9, 1951 was reaffirmed in an oral decision given on September 4, 1951. Pursuant to said oral decision the following order was signed on September 17, 1951:

"* * * it is

"Ordered, Adjudged and Decreed that this Court's

Order dated the 9th day of August, 1951, which approved the Order of the Referee in Bankruptcy is hereby re-affirmed and confirmed without prejudice to the rights of R. D. Tembreull and Albert A. Mayer to interpose such motions as the law allows against the original petition in bankruptcy under which the McHugh Trucking Company and James E. McHugh were adjudicated bankrupts."

Motion of R. D. Tembreull and Albert A. Mayer "to dismiss the petition in bankruptcy in this cause filed against McHugh Trucking Company and James E. McHugh insofar as it seeks to adjudicate the McHugh Trucking Company, a bankrupt" was filed September 17, 1951, briefs were submitted and oral arguments of counsel heard by the Court. The petition to dismiss must be denied. The language of the adjudication made by Judge Black has been set forth above. Under it McHugh Trucking Company, a limited partnership, and James E. McHugh, general partner, jointly, were adjudged bankrupt. The adjudication was without prejudice to the rights of any creditor or the trustee. It is apparent from the transcript of the proceedings before Judge Black that when the adjudication was made counsel for the petitioners clearly understood that the rights of any creditor or the trustee against R. D. Tembreull and Albert A. Mayer were reserved. In view of the reservation contained in the adjudication the petitioners must have anticipated some hearing to determine whether or not R. D. Tembreull and Albert A. Mayer were or were not general partners in so far as the rights of creditors were concerned. After the Referee made his finding that R. D. Tem-

breull and Albert A. Mayer were general partners he ordered that they file in the proceeding bankruptcy schedules, listing all assets and liabilities of each of them, in the form and content as prescribed by the Bankruptcy Act. There is nothing in the order of the Referee which attempts in any manner to change or modify the adjudication as rendered by Judge Black.

The case of Kaufman-Brown Potato Company vs. Long, 182 F. 2d, 594 is not applicable in this situation. In that case the Trustee in Bankruptcy asked that an order to show cause issue as to "why an order should not be made and entered herein ordering, adjudging and decreeing that each of them (Kaufman, Brown and Kaufman-Brown Potato Company) is a general partner of Gerry Horton Farms, one of the * * * bankrupts, and why a further order should not be made and entered therein amending, modifying and changing the order of adjudication * * * in conformity to the foregoing * * *." The Referee's order was approved by the Court and the order of adjudication was amended so that not only were the four previously adjudicated bankrupts declared bankrupt but in addition a different business enterprise was adjudged bankrupt. The Trustee in the case before us has made no such request and there has been no order entered by the Referee or Judge modifying the original order signed by Judge Black. The adjudication having been made as the result of the petition of Tembreull and Mayer and Simmons, and with their full understanding that it was without prejudice to the rights of creditors, they should have

anticipated the investigation and hearing before the Referee and the possibility of a finding such as was made, namely, that Tembreull and Mayer were general partners. The finding having been different than they may have anticipated they are not in a position now to come back to the Judge and ask that the adjudication be changed. Furthermore, while there is some testimony in the original hearing before Judge Black that the partners, Tembreull and Mayer, were personally solvent no finding was made upon that issue and in order to determine what the actual conditions were or are as to the financial status of Tembreull and Mayer it is necessary that they submit schedules such as were ordered and directed under the order of the Referee.

The motion to dismiss filed by R. D. Tembreull and Albert A. Mayer is denied.

Dated November 2, 1951.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

To: William J. Steinert, Trustee in Bankruptcy, and Nelson R. Anderson, Attorney for Trustee:

Notice is given that Albert A. Mayer and R. D. Tembreull hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the above-entitled court dated November 2, 1951,

which denied the motion filed by R. D. Tembreull and Albert A. Mayer September 17, 1951, which motion requested the dismissal of the original petition in bankruptcy filed against McHugh Trucking Company and James E. McHugh insofar as it sought to adjudicate the McHugh Trucking Company as a bankrupt.

Dated this 5th day of November, 1951, at Seattle, Washington.

/s/ J. LAEL SIMMONS,
Attorney for R. D. Tembreull,
Albert A. Mayer.

[Endorsed]: Filed November 5, 1951.

[Title of District Court and Causee.]

STIPULATION AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

It is hereby stipulated by and between J. Lael Simmons, attorney for R. D. Tembreull and Albert A. Mayer, and Nelson R. Anderson, attorney for trustee, that the time for filing the record on appeal and docketing the appeal with the United States Court of Appeals for the Ninth Circuit be extended until and including Wednesday, January 2, 1952.

/s/ J. LAEL SIMMONS,
By L. M. Y.
Attorney for R. D. Tembreull
and Albert A. Mayer.
NELSON R. ANDERSON,
Attorney for Trustee.

ORDER

This matter having come on for hearing before the undersigned judge of the above-entitled court on the stipulation of the parties for extension of the time for filing the record on appeal and docketing the appeal, the court having considered the records and files herein and it appearing that the time for filing and docketing as originally prescribed has not expired,

Ordered that the time for filing the record on appeal and docketing the appeal with the United States Court of Appeals for the Ninth Circuit be and is hereby extended until and including Wednesday, January 2, 1952.

Done in Open Court this 16th day of November, 1951.

/s/ JOHN C. BOWEN,
Judge.

[Endorsed]: Filed November 16, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended,

of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, together with Petitioner's Exhibits 1 and 3, and Trustee's Exhibits 1 to 5 inclusive, as set forth below, and that said pleadings and exhibits constitute the record on appeal from the Order dated September 17, 1951, which reaffirmed and confirmed its earlier Order filed and entered August 9, 1951, and from the Order denying motion to dismiss petition in bankruptcy filed and entered November 2, 1951, to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Creditor's Petition.
2. Praecipe.
3. Appearance of Attorney I. J. Bounds, Attorney for Bankrupt.
4. Motion of James E. McHugh for change of venue.
5. Answer of James E. McHugh, alleged bankrupt, to creditors' petition.
6. Application of James E. McHugh for jury trial.
7. Subpoena to Alleged Bankrupt with Sheriff's return of service upon James E. McHugh, manager of said McHugh Trucking Co., and James E. McHugh.
8. Acceptance of Service by Simmons & McCann, attorneys for Petitioning Creditors, of Appearance, Motion for Change of Venue, Answer and Application for Jury Trial.

9. Notice of Motion for change of venue filed by Attorneys for Petitioners.

10. Acceptance of service of foregoing notice of motion by attorney for alleged bankrupt.

11. Motion of petitioning creditors to strike demand for jury and to set cause for hearing.

12. Notice of petitioning creditors to set for hearing motion to strike demand for jury.

13. Copy of letter from Clerk of Court to Mr. I. J. Bounds.

14. Waiver of notice of presentation of Order of Adjudication, signed by Lee L. Newman for Russell W. Newman.

15. Adjudication of Bankruptcy.

16. Order of Reference.

17. Petition for Relinquishment of Books and Records.

18. Order Relinquishing Books and Records.

19. Statement of Affairs.

19-a. Petition and Schedules.

20. Bond of Trustee Richard Kent Stacer.

21. Reporter's transcript of oral decision by Judge Black on March 24, 1950.

22. Trustee's receipt of certain impounded documents from Clerk of Court.

23. Copy of Referee's order of disbursements.

24. Filed copy of Referee's order approving resignation of trustee and exonerating his bond.

25. Bond of Trustee William J. Steinert.

26. Special Appearance of R. D. Tembreull and Albert Mayer.

27. Referee's Certificate on Review, attached to which are the following:

27-a. Petition and Report of Trustee.

27-b. Order for Examination of Bankrupt, and Order to Show Cause.

27-c. Order Directing Albert Mayer and R. D. Tembreull to File Bankruptcy Schedules.

27-d. Petition for Review.

27-e. Copy of Order directing Albert Mayer and R. D. Tembreull to file bankruptcy schedules.

27-f. Reporter's transcript of show cause hearing 1/12/1951.

28. Referee's certificate of having mailed notice and copy of Referee's Certificate on Review.

29. Notice of filing of Referee's certificate on review.

30. Letter from Referee to Clerk of Court.

31. Stipulation extending time for submitting points and authorities.

32. Appellants memorandum of points and authorities.

33. Stenographic transcript of proceedings on March 24, 1950.

34. Trustee's brief.

35. Notice of issue of law, Petition for Review.

36. Appellants' reply memorandum of points and authorities.

37. Trustee's additional authorities.

38. Trustee's authorities.

39. Reporter's transcript of Court's remarks July 6, 1951.

40. Order signed by Judge William J. Lindberg.

41. Trustee's additional authorities.

42. Appellants' answer to trustee's additional authorities; Appellants' argument in lieu of oral argument.

43. Motion for reconsideration or in alternative for rehearing.

44. Order signed by Judge William J. Lindberg.

45. Notice of Hearing of Motion signed by J. Lael Simmons.

46. Brief of Trustee on Motion to Dismiss.

47. Answer of Trustee to Motion to dismiss original petition alleging bankruptcy.

47-a. Application of attorney Leslie M. Yates for permission to participate in case.

47-b. Brief of Albert A. Mayer and R. D. Tembreull in support of motion to dismiss.

48. Affidavit of Esther M. Rosser re first meeting of creditors.

49. Trustee's reply brief.

50. Petitioners' supplemental brief in support of motion to dismiss.

51. Cost bond on appeal to the Court of Appeals for the Ninth Circuit.

52. Notice of Appeal to the Court of Appeals for the Ninth Circuit.

53. Form of order denying motion to vacate adjudication, presented by J. Lael Simmons, attorney for R. D. Tembreull and Albert A. Mayer—not signed.

54. Form of order denying motion to dismiss, presented by Nelson R. Anderson, attorney for Trustee—not signed.

55. Reporter's transcript of oral decision on October 8, 1951.

56. Copy of letter from Clerk of Court to Nelson R. Anderson.

57. Order denying motion to dismiss petition in bankruptcy.

58. Memorandum signed by William J. Lindberg, Judge, on November 2, 1951.

59. Notice of Appeal to the Court of Appeals for the Ninth Circuit.

60. Copy of letter from Clerk of Court to Nelson R. Anderson.

61. Stipulation and Order extending time for filing record on appeal.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of appellants, to-wit:

Two Notices of Appeal, $5.00 each, $10.00, and that this amount has been paid to me by the attorneys for the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 26th day of December, 1951.

[Seal] MILLARD P. THOMAS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States, for the Western District of Washington, Northern Division

In Bankruptcy—No. 38376

In the Matter of:

McHUGH TRUCKING COMPANY, a limited partnership, and JAMES E. McHUGH, General Partner.

HEARING ON ORDER TO SHOW CAUSE

Seattle, Washington, January 12, 1951

Be It Remembered that on this 12th day of January, 1951, at the hour of 2:00 o'clock p.m., at 600 United States Court House, Seattle, Washington, the above entitled matter came on for hearing, pursuant to notice and subpena, before the Honorable Van C. Griffin, Referee in Bankruptcy.

Appearances: Nelson R. Anderson, Esq., appearing for William J. Steinert, Esq., Trustee. J. Lael Simmons, Esq., (of Messrs. Simmons & McCann) appearing for Messrs. Albert A. Mayer and Richard D. Tembreull, respondents. J. Vernon Clemans, Esq., appearing for James E. McHugh. Wallace Aiken, Esq., appearing for Seattle First National Bank, Main Branch.

Thereupon, the following proceedings were had and testimony given, to-wit: [1*]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

PROCEEDINGS

The Referee: The bankruptcy Court will come to order.

The trustee has filed a petition, outlining certain facts, and based upon that petition and the record herein, the Referee entered an order on the 13th day of December, 1950, directing that Albert A. Mayer and R. D. Tembreull appear before the undersigned Referee in Bankruptcy, at a certain time and place, which has been determined as this time, for examination, and to show cause, if any, why they and each of them should not be held and declared to be general partners with James McHugh, Bankrupt, in that certain partnership known as the McHugh Trucking Company; and, further, why they should not be required to file schedules in bankruptcy, as required by the Bankruptcy Act, and thereafter file petitions in bankruptcy.

The Referee entered an order and issued subpenas for them to appear at this time for examination.

I would like to take the appearances at this time.

Mr. Simmons: Mr. McCann filed a special appearance for Mr. Tembreull and Mr. Mayer, but it seems I am appearing special for Mr. Mayer and Mr. Tembreull——

The Referee: It was signed by you and Mr. McCann, for you to appear specially for Mr. Tembreull and Mr. Mayer, and that appearance has been noted.

About these subpenas—it has occurred to me that

you might want to call these short witnesses first, and you may proceed to do so.

Mr. Anderson: I would like to call the representative of the Seattle First National Bank.

Mr. Simmons: Let the record show at this time the Respondents object to this proceeding—this hearing—and particularly to the interrogation of this witness, until such time as it is shown that the trustee in this matter represents a creditor who extended credit to this partnership on the representation and on the basis of the fact that Mayer and Tembreull were general partners. I believe there is no occasion for an inquiry into the liability of Mr. Tembreull or Mr. Mayer as general partners until and unless it be shown that someone now represented by the trustee in bankruptcy did extend credit based on the general liability of one or the other, or both of these partners.

The Referee: The Referee entertains a different concept of the law. The objection will be over-ruled. You may proceed, Mr. Anderson.

REGINALD F. GEARHEARD

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Your name is? [4]

A. Reginald F. Gearheard.

Q. You are employed by the Seattle First National Bank? A. Yes, sir.

Q. What position do you hold with the bank?

A. Assistant vice-president in the Consumer Credit Department.

(Testimony of Reginald F. Gearheard.)

Q. You were subpena'd to bring books and records in the possession of the bank, relating to McHugh Trucking Company. Have you brought that material? A. I believe I have.

Q. Would you first produce the signature card the bank had in its possession?

Mr. Simmons: May I interrogate preliminarily, Your Honor?

The Referee: Well, Mr. Simmons, the trustee has the right to examine any witness with respect to business done with the bank, independent of your position; they have the right to make this examination and I wanted to take this examination now, subject, of course, to your objection as it may apply to your clients, so that this could get under way. We will reserve your objection.

Q. (By Mr. Anderson): Do you have the signature card? A. Yes.

Mr. Anderson: May we have the right to substitue a photostatic copy? [5]

Mr. Simmons: No objection, that is, to the substitution.

The Referee: This will be marked Trustee's Exhibit No. 1.

(Document referred to was marked for identification as Trustee's Exhibit No. 1)

Q. (By Mr. Anderson): Showing you what the Referee has marked as Trustee's Exhibit No. 1, is that the signature card of the McHugh Trucking Company at the Seattle First National Bank?

A. Yes, it is.

(Testimony of Reginald F. Gearheard.)

Mr. Anderson: I offer this in evidence.

Mr. Simmons: And I object to it as incompetent, immaterial and irrelevant.

Mr. Anderson: I offer in evidence Trustee's Exhibit No. 1.

The Referee: It will be admitted.

(Document heretofore marked Trustee's Exhibit No. 1 for identification, was received in evidence.)

Q. (By Mr. Anderson): Have you with you any cancelled checks of this company? A. No, sir.

Q. Have you with you any notes given to your bank by McHugh Trucking Company? [6]

A. The notes, I believe, were entered by the attorney some time ago.

Q. Were those notes put in evidence in your suit?

Mr. Aiken: They are attached to claimant's claim, and which are on file with the petition.

A. We have copies here.

The Referee: Let me see them.

(The Referee examines documents)

The Referee: The law provides that you present the originals, but the Referee is satisfied that this is a copy of the original, and therefore will allow you to substitute a copy.

Mr. Simmons: What I am saying, I am not objecting to it because it is a copy——

The Referee: All right, that will dispose of your objection.

(Testimony of Reginald F. Gearheard.)

Q. (By Mr. Anderson): Your bank filed a claim in the court in this same bank matter?

A. Yes, sir.

Q. And to your claim was attached copies of the notes given by Albert A. Mayer, James E. McHugh, and D. Tembreull, doing business as James McHugh Trucking Company, and signed James McHugh, Partner, R. D. Tembreull, Partner, and Albert Mayer, Partner; the first one being dated September 29, 1948, for $15,302.40? [7]

A. Yes, sir.

Q. And then your claim has another note attached to it, signed in the same fashion?

A. Yes.

Q. Also, your claim has attached to it a copy of a chattel mortgage dated the 29th day of September, 1948, and signed Albert A. Mayer, James McHugh, and R. D. Tembreull, Partners, doing business as McHugh Trucking Company; and also signed James *F.* McHugh, Partner, R. D. Tembreull, Partner, and Albert Mayer, Partner?

A. Yes, sir.

Q. This chattel mortgage was duly acknowledged by these three men? A. Yes, sir.

Q. And there was an affidavit attached, as well as the acknowledgment? A. Yes, sir.

Mr. Anderson: I offer this in evidence as Trustee's Exhibit No. 2.

Mr. Simmons: I will object, not because it is a copy, but because, in my opinion, it isn't the proper time, under my original statement.

(Testimony of Reginald F. Gearheard.)

The Referee: It will be considered as evidence. I won't take it out of the claim file; we will just consider it in evidence. [8]

Q. (By Mr. Anderson): Mr. Gearheard, do you know, of your own knowledge, who deposited money in this McHugh Trucking Company account?

A. No, I don't.

Q. Of your own knowledge, do you or do you not check on the accounts?

A. Well, I might say this: I am not a teller.

Q. You are not a teller, but in the course of your business as an employee of the bank, do these canceled checks come to your attention in any way at any time? A. No, they don't.

Q. Did you bring some ledger sheets along with you? A. I did.

Q. Did you make sufficient comparison of a number of ledger sheets of the Seattle First National Bank to McHugh Trucking Company with the originals in your hand, so that you could say they are your originals? A. Yes.

Q. Also, did you look at certain canceled checks here to see whether those were checks drawn on or honored by your bank?

A. What was the question?

Q. The first question—are these ledger sheets put out by Seattle First National Bank and given to McHugh Trucking Company? [9]

A. Yes, they appear to be our forms.

Q. And the canceled checks were checks that were cashed by your bank?

(Testimony of Reginald F. Gearheard.)

A. Well, those I have looked at, are, yes, sir.

Q. Well, have you looked at them all on the front page? (hands canceled checks to witness)

Mr. Aiken: Is it true that the checks identified by the numbers 19-2 over 1250 are checks drawn on the main office?

The Witness: That is right.

Q. (By Mr. Anderson): Well, when those came back to your bank, you cashed them — honored them?

A. Yes. Do you want me to take the time to make comparison with the ledger sheets?

Q. No. From the appearance——

A. From their appearance, those appear to have been cashed by our bank. Do you want me to look at the rest of them?

Q. Go ahead. A. Yes, sir.

Mr. Anderson: I will offer in evidence ledger sheets from the Seattle First National Bank, opening date December 31, 1948, up to the month of January, 1949; then the month of January, 1949; another covering the month of February, 1949; another sheet covering [10] March, 1949; April, 1949; and May, 1949; together with canceled checks written on said account; all of said checks being signed McHugh Trucking Company, and below that name appears R. D. Tembreull, Albert A. Mayer, and below the last name, the address of 626 13th Ave. North.

I will offer this as Trustee's Exhibit No. 3.

(Testimony of Reginald F. Gearheard.)

(Whereupon, the documents referred to were marked Trustee's Exhibit No. 3 for identification.)

The Referee: It will be admitted.

(Whereupon, the documents previously marked Trustee's Exhibit No. 3 for identification, were received in evidence.)

Mr. Simmons: Object to as incompetent and irrelevant, not material to the issues, and as in my original statement.

Q. (By Mr. Anderson): Showing you a pink printed sheet, with the heading, "Combined authority and individual pledge for partnerships," addressed to Seattle First National bank, one being dated August 12, 1948; the other being a duplicate copy of it, I will ask you who signed the pink printed sheet?

A. Albert Mayer, James McHugh, and R. D. Tembreull.

Mr. Anderson: I will offer Trustee's 4 in evidence.

Mr. Simmons: Same objection. [11]

The Referee: Same ruling. It will be admitted.

(Whereupon, the documents referred to were marked for identification as Trustee's Exhibit No. 4, and received in evidence.)

Mr. Anderson: You may cross-examine.

Cross Examination

Q. (By Mr. Simmons): Mr. Gearheard, did

(Testimony of Reginald F. Gearheard.)

your bank ever extend any credit to McHugh Trucking Company, solely?

A. We made loans to McHugh Trucking Company.

Q. Solely? I mean, alone—by itself?

A. I don't think I understand your question.

Q. Well, isn't it a fact that when credit was asked of the bank, you insisted on the liability of Mr. Tembreull and Mr. Mayer before you would extend credit?

A. Well, if you put it that way, yes.

Q. Does your bank carry any kind of card, or any printed form just intended for use with limited partnerships?

A. I don't know whether we do or not. I can't answer that.

Q. As far as you know, the forms you have are for partnerships, without distinction between general and limted? A. That is right, yes, sir.

Q. And so far as you know, the credit extended to McHugh Trucking Company was on the basis of the signatures of Mr. Mayer, Mr. Tembreull and Mr. McHugh. [12] A. That is right.

Q. The fact of whether or not this was a general, or a limited partnership didn't enter into your consideration? A. No, sir.

Q. Now, since the petitioner was adjudged bankrupt, is it not true that you have sued Mr. Mayer and Mr. Tembreull outside the bankruptcy and obtained judgment against them on the signatures which they gave you?

(Testimony of Reginald F. Gearheard.)

A. I will say that a suit has been commenced.

Q. You don't know whether or not judgment has been entered?

A. I don't know whether it has been entered or not.

Q. In other words, it was independent of the bankruptcy? A. Yes, sir.

Q. And you have had considerable negotiations with Mr. Tembreull and Mr. Mayer to see if you could get that account liquidated?

A. Yes, sir.

Q. Without reference to the bankruptcy?

A. That is right.

Q. Now, Mr. Gearheard, do you know of anybody inquiring at your bank to examine these particular documents that have been introduced into evidence, with a view of extending credit to McHugh Trucking Company?

A. You mean, recently—in the last few days?

Q. Nobody has extended credit in the last few days. [13]

A. I was just trying to understand your question.

Q. Maybe I could make the question a little more clear. Are you aware of the existence of any creditors of McHugh Trucking Company, or Mr. Mayer or Mr. Tembreull, who became such because they examined the papers you had?

Mr. Anderson: I think that is irrelevant and immaterial.

(Testimony of Reginald F. Gearheard.)

Q. (By Mr. Simmons): Do you understand the question? A. No.

Q. You took a combination authority and individual pledge agreement for partnerships—you took a form like that and you had Messrs. Mayer and Tembreull and McHugh sign that form?

A. Yes, sir.

Q. Now, do you know of anybody who came and said, "I have been asked to extend credit to McHugh Trucking Company and I want to know if these three men are general partners?"

A. No, not to my knowledge.

Q. You took these documents purely for your own purposes?

A. If you are speaking of the combined authority card, yes.

Q. And the chattel mortgage and signature card? A. Yes, sir.

Q. You didn't publish them to anyone? [14]

A. No, sir. Outside of the filing of the chattel mortgage.

Q. Except for the filing? A. Yes, sir.

Q. As far as you know, the filing of the chattel mortgage did not bring inquiries to your office?

A. As far as I know, it did not.

Mr. Simmons: I think that is all.

The Referee: Any other questions?

(No response.)

The Referee: If there are no objections, he may be excused. You may step down, Mr. Gearheard.

(Witness excused)

Mr. Nelson: I will offer the two so-called limited partnership agreement of McHugh Trucking Company—of McHugh, Mayer and Tembreull, bearing the date of acknowledgment of June 23, 1948, and filed with the county clerk of King County on the 2nd day of November, 1950.

The Referee: Any objections.

Mr. Simmons: I have no objection to that, but it was filed in April.

The Referee: It is a certified copy, and it will be admitted.

Mr. Nelson: I want to know when it was filed in April, Mr. Simmons.

Mr. Simmons: On April 20, 1949. [15]

Mr. Anderson: I want to amend my statement. It was filed on April 20, 1949.

The Referee: Mr. Simmons, if you wish to have an appearance, you may do so, and I will pass on that.

Mr. Simmons: This special appearance might be —well, I might appear a little awkward in arguing that. Mr. McCann had some theory you had no jurisdiction unless it were adjudged that this is a limited partnership.

The Referee: Even so, I would have the right to examine them.

Mr. Simmons: I don't see at this time any particular merit in arguing a special appearance.

The Referee: It will be over-ruled. You can, if you wish to, make an oral reply or statement on what your position is as to the petition and order to show cause why they shouldn't file schedules.

You haven't replied to my written request, and we will proceed with the examination.

Mr. Simmons: I think that probably, for the purpose of the record, I will make a statement now.

The Referee: It will help me if you will do so.

Mr. Simmons: Perhaps in doing so, I should take the petition itself and go through it paragraph by paragraph. I don't wish to question Judge Steinert's [16] qualifications, as set out in Paragraph 1.

The Referee: You will waive that?

Mr. Simmons: Yes. And I will concede that, as alleged in Paragraph 2, that McHugh, Mayer and Tembreull entered into a purported limited partnership agreement. I will admit the additional allegations in Paragraph 2 to the effect that McHugh Trucking Company, a limited partnership, was adjudged bankrupt, and that James T. McHugh was adjudged bankrupt, and that the adjudication was based upon the petition filed by Albert Mayer and R. D. Tembreull and J. Lael Simmons, plus the testimony given in support of that petition.

I deny that Albert Mayer and R. D. Tembreull and James McHugh were general partners or that each of the partners exercised equal control over the business of the partnership.

The Referee: Each of the partners exercised full control?

Mr. Simmons: We deny that: Well, maybe I shouldn't deny it for all purposes. It depends on the definition of the word "control", in the sense that one was a manager and the others may have given aid in certain specific instances, but I think for the purpose of this, I will deny they exercised control.

I will admit a filing of a limited partnership on the 20th day of April, 1949. I deny that the indebtedness was contracted prior to that day—all of it.

I have no information upon which to base the truth or falsity of the allegations in Paragraph 3 pertaining to a 1945 International truck and trailer, and the appraisal thereof, and the condition thereof.

The same applies to Paragraph 4. I haven't sufficient information to qualify the truth or falsity of the allegations at this time, and therefore deny all allegations contained in it.

I suppose we just nolo contendere on Paragraphs 5——

The Referee: And No. 6, also?

Mr. Simmons: Yes, sir. And as to 7, we will here and now reply to that. We deny we should file any schedules.

Now, we might go further and state to the court that, if my memory serves me rightly at this time, that during the year 1945, of the session of the legislature in 1945, they adopted what is known as the Uniform Limited Partnership Act in the state of Washington; that pursuant to that Uniform Limited Partnership Act, the parties, Mayer and Tembreull, entered into a partnership arrangement with James McHugh, who at that time was the holder, or the alleged holder, of certain permits to operate trucks in the trucking business. [18]

We also allege that in entering into this partnership it was specifically agreed by and between the parties that it was the intention of Mr. Mayer and

Mr. Tembreull that they should not be general partners; that they were merely contributing capital. We further allege that in the course of the operations of the McHugh Trucking Company, certain creditors required, before they would extend credit to McHugh or the McHugh Trucking Company, that Mayer and Tembreull lend the credit of their names to the debt; and that in a number of such instances they did lend the benefit of their credit to the partnership enterprise, in some instances signing a conditional sales contract; in other instances, signing a chattel mortgage or note.

We allege there is no creditor who extended credit to the partnership based on the claim or upon the fact that Mayer or Tembreull were general partners, who has not, separately from the bankruptcy proceeding, in the Superior Court of the State of Washington, attempted to establish liability of Mayer and Tembreull. There are a number of those cases still pending.

We further allege it was the intent of the legislature, and should be the intent of the court, that when one partner puts money into this limited partnership venture, he occupies a position tantamount to that of [19] a stockholder of the company, insofar as his liability is concerned.

In this particular instance, the trustee does not represent anybody extending credit based on inquiry into the facts and determination of whether or not Mr. Mayer and Mr. Tembreull were general or limited partners.

The Referee: You may proceed, Mr. Anderson.

ALBERT A. MAYER

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Will you state your name? A. Albert A. Mayer.

Q. And your address? A. 626 13th North.

Mr. Simmons: Counsel, before you get into this——

Your Honor, I take it there is no need for me to repeat my objections on the ground of my original theory, and I think I have made my original theory clear to the Court that until it has been made to appear to the satisfaction of the Court that there is probable cause, so to speak, that the trustee represents someone who extended credit in reliance upon, or the signatures, or the association of these men—Mayer or Tembreull, or both of them as general partners, that this hearing is [20] premature, and with that understanding, I will not continually object to the testimony, and we can proceed faster.

The Referee: I will let that be a part of your objection; but there is no secret I don't concur with you, Mr. Simmons.

Q. (By Mr. Anderson): Now, Mr. Mayer, when did McHugh Trucking Company open an account with the Seattle First National Bank?

A. That I couldn't tell you.

Q. Could you refresh your recollection by looking at the signature card, marked Trustee's Exhibit No. 1?

A. You mean, as to the beginning of this?

(Testimony of Albert A. Mayer.)

Q. Yes, when did they open the account?

A. I don't remember, to be honest with you, but it was some time in 1948.

Q. Looking at the date stamped on it, of June 26, 1948—on Trustee's Exhibit No. 1, it would appear to you that it was opened on or about that date?

A. That is probably right.

Q. Is that your signature on Trustee's No. 1?

A. Yes, sir.

Q. Is that the signature of R. D. Tembreull on Trustee's Exhibit No. 1?

A. Well, I wouldn't like to verify that. [21]

Q. I asked you if that is his signature; don't you know his signature?

A. I would imagine it was, but I wouldn't swear to it.

Mr. Simmons: Let me say to counsel that there is no use bothering Mr. Mayer on that when it can be clarified by actual testimony.

Q. (By Mr. Anderson): Will you look at the canceled checks contained in Trustee's Exhibit No. 3? Are those your signatures? A. Yes.

Q. And do they also bear the signature of R. D. Tembreull?

A. Yes, roughly glancing through, I would say yes.

Q. Who opened that account, on or about July 26, 1948?

A. I presume both of us did—I don't just recall.

Q. And the both of you signed the checks written on the account?

(Testimony of Albert A. Mayer.)

Mr. Simmons: We will admit that, counsel.

Q. (By Mr. Anderson): Do you have any other bank accounts in the city of Seattle?

A. In the city of Seattle? No.

Q. Do you have any bank accounts in Yakima?

A. Yes, sir.

Q. Who signed the checks drawn on the Yakima bank?

A. Well, I think the majority were signed by James McHugh, and I presume that for convenience, we might have [22] signed a few of them.

Q. You and Mr. Tembreull had the right to sign checks on the Yakima bank in the event he was out of town? A. Yes.

Q. Who started keeping the books for this concern? A. I can't remember.

Q. Did Mr. Tembreull, at first, keep the books?

A. Just notes—mainly notes. There was an accountant but I can't recall his name——

Mr. Simmons: Let him get the files.

The Witness: I am going only from recollection.

Mr. Simmons: In order to get this witness straightened out, my recollection is that Mrs. McHugh started, and probably Mr. Tembreull followed, but from the formation of the organization, I believe an accountant by the name of Salonka took over, and after that——

The Witness: Salonka was the first and I think Bruenn was the second.

Mr. Anderson: I thought from your discussion that some other accountant came ahead of this man——

(Testimony of Albert A. Mayer.)

Mr. Simmons: I think Salonka was the first man who was really an accountant who followed Mrs. McHugh—he took the books over and then a fellow named Bruenn took over.

Mr. Anderson: Are you willing to stipulate that [23] Mrs. McHugh kept some books; next Mr. Tembreull took over for a short time; and then they got an accountant by the name of Salonka?

Mr. Tembreull: Well, I don't know—after Mrs. McHugh, all I wanted was to get some notes for use with my own books, but I did turn them all over to Salonka when he started taking care of the books.

Q. (By Mr. Anderson): Who employed the accountant, Mr. Salonka? A. We did.

Q. Who are "we"?

A. Tembreull and myself.

Q. Salonka is a Seattle man? A. Yes, sir.

Q. During the operation of this business you and Mr. Tembreull were in Seattle and McHugh was in Yakima?

A. He was all over—out of Yakima—in and out.

Q. He drove a truck?

A. Part of the time, yes.

Q. Did you drive a truck at any time?

A. I might have made a trip or so, but that would be all.

Q. Did Mr. Tembruell make any trips with the truck?

A. I couldn't say as to what he did. You are speaking of Mr. Tembruell?

Q. Yes. [24] A. Well, I couldn't say.

(Testimony of Albert A. Mayer.)

Q. What did your equipment consist of that was used in the conduct of this business?

A. What it consisted of?

Q. Yes.

A. I think we had four or five tractors and combined with open trailers.

Q. International, Reo and Federal?

A. Yes.

Q. Who bought those?

A. McHugh Trucking Company.

Q. Did you buy them?

A. No, McHugh Trucking Company bought them.

Q. How did you go about purchasing them—did you have a say in that? A. Sure.

Q. And did Mr. Tembreull have a say in the purchase of this equipment? A. Yes.

Q. Who did you buy it from—who was it bought from? A. Different dealers.

Q. Well, from the Philippine Produce Company? A. They negotiated a deal——

Q. Did you, personally, and Mr. Tembreull, personally, give a note to this Philippine Produce Company? [25]

A. Yes, we were called into that deal.

Q. Then you personally executed a chattel mortgage on this material to the Philippine Produce Company?

Mr. Simmons: Your Honor, we are getting into a lot of detail about which we can stipulate.

Mr. Anderson: All right, you stipulate.

(Testimony of Albert A. Mayer.)

Mr. Simmons: We will stipulate that McHugh Trucking Company entered into an arrangement with the Philippine Produce Company at Wapato, and in the course of that deal, Mr. Mayer and Mr. Tembreull were required to and did sign, in addition to the McHugh Trucking Company, for the payment of the purchase price, and for performance of the contract. I believe, if my memory serves me right, that it was a contract and not a mortgage.

Mr. Anderson: That is correct.

Mr. Simmons: I think it was a conditional sales contract; that the Philippine Produce Company would furnish for them, hauling, and the men would buy this equipment and pay for it, and they are each personally liable, if the Philippine Produce Company didn't break its contract before the liability was established.

That is our only defense in that action, which was an action brought before the Yakima courts—the superior court—to establish that liability at this time. [26] That action is still pending.

Mr. Anderson: As long as we are stipulating, James W. Murray brought suit against these three men?

Mr. Simmons: Yes.

Mr. Anderson: He did?

Mr. Simmons: Yes, No. 411610; in which it was alleged that these three men were general partners, doing business under the name and style of McHugh Trucking Company, and I think the answer admitted that. Will you stipulate that?

(Testimony of Albert A. Mayer.)

Mr. Simmons: Well, I don't know whether I will or not. I don't think it makes any material difference. That action is based on a written instrument, and if any liability attached to that, it must be upon that written instrument, which was signed by all three of them.

Mr. Anderson: What agreement is that?

Mr. Simmons: It relates to the furnishing by Mr. J. W. Murray of money to the sum of, if my recollection serves me correctly, $5,000 towards the purchase of a new truck which, when purchased, would be combined with the other trucks operated by McHugh Trucking Company, for the purpose of operating those trucks in the hauling business for revenue; and that the revenue, when and if received, should after payment of the overhead, [27] be divided between Mr. Murray and McHugh Trucking Company. Murray claims there was a profit made and he didn't get his share, and McHugh Trucking Company claims there was no profit made of which he didn't get his share.

Mr. Anderson: All right.

Q. (By Mr. Anderson): Mr. Mayer, who are the drivers of the trucks; who talks to them; who employed them?

A. I don't believe I ever employed a single one, but I have talked to them.

Q. Did you ever fire any of them?

A. At least, I never wrote out a check for that.

Q. Did you ever discharge one?

A. I leave that to Jim McHugh to answer. I don't believe I ever did.

(Testimony of Albert A. Mayer.)

Q. Did you solicit any business for the concern?

A. Some business; very little.

Q. Did Mr. Tembreull solicit some business for the firm, that you know of?

A. Not that I know of.

Q. Did you appear on the payroll of this concern? A. I did not.

Q. You withdrew sums of money, did you not?

A. Not to my recollection, for wages. I don't think I drew anything. [28]

Q. What are these checks which you have drawn in your own favor, Mr. Mayer?

Mr. Simmons: You are assuming there are some?

Mr. Anderson: Yes, I am assuming there are.

Mr. Simmons: Have you got some of them?

Mr. Anderson: I have several books of them. You cross-examine and tell me how many checks there are.

Cross-Examination

Q. (By Mr. Simmons): I will ask you if it isn't a fact that after the McHugh Trucking Company got under way, you were asked, from time to time, to advance additional capital, Isn't that true?

A. Yes, sir.

Q. I will ask you whether or not, prior to the 23rd of June, 1948, if you had conversations with Messrs. McHugh and Tembreull, leading up to the preparation and signing of a certificate of limited partnership, such as has been filed here as Trustee's No. 3? A. Yes.

(Testimony of Albert A. Mayer.)

Q. Do you recall any of those conversations?

(No response)

Q. Do you recall any of the conversations when that was executed?

A. Well, what I am leading up to—I have known Jim McHugh [29] for a long time——

Mr. Anderson: I am going to object if any conversation whatsoever that took place——

The Referee: His memory seems to be very poor. What do you remember about that?

The Witness: I remember when we entered into the deal, I told Jim McHugh at the time, "O.K., we will put in $1500. apiece, and we will start this limited partnership, but I don't want any part of the management".

The Referee: I want to hear this, and what these checks are for. He doesn't remember a thing about that.

Q. (By Mr. Simmons): Do you remember now?

A. (No response.)

Mr. Anderson: You don't know what the checks were for, and you were in the business?

The Witness: Well, this is a long time ago.

The Referee: I will ask him again.

The Witness: I know some of them.

Mr. Simmons: I am objecting to the attitude of the Court.

The Witness: That was a payment made on trucks.

The Referee: Did they pay anything to you?

The Witness: They didn't pay anything to me.

(Testimony of Albert A. Mayer.)

Q. (By Mr. Simmons): If there are checks there payable in [30] your behalf——

The Referee: Don't lead the witness; let him testify.

Q. (By Mr. Simmons): Well, state if there are checks there, what they would be for?

A. These are all of them.

Q. Are any of them drawn payable to you?

The Referee: Where are they? Are they there?

Q. (By Mr. Simmons): In other words, if you didn't get checks for wages, what did you get them for, if you got them?

A. There is one in here—repayment on truck and trailer, $406.00.

Q. Who is it payable to?

The Referee: What was that?

The Witness: For repayment of loan. And here is on one for $15.00 made out to me. I don't recall what it is unless it was for cash advanced.

Q. Here is a stub dated 3/1/49, A. A. Moore, repay loan advanced on trip to Yelm, Washington.

A. Yes, that is a trip that he made.

Q. What are the others? Do you have any more? Did you have a man named Dicket?

A. Yes, and here is one for $9.97, repayment of loan; and that is the extent of them. [31]

The Referee: How about this repayment of loan; was that a capital investment, or additional capital?

The Witness: No, the capital investment was put in at one time. This was an additional loan—this was afterwards.

(Testimony of Albert A. Mayer.)

The Referee: Were you at the office of the company every day, Mr. Mayer?

The Witness: No.

The Referee: When were you at the office?

The Witness: We didn't have any office.

The Referee: Well, when did you do business?

The Witness: Whenever the truck came into town, we would load the truck. Headquarters was supposed to be where Jim McHugh was, but if we could lend any assistance, we would do so.

Q. (By Mr. Simmons): From time to time did you advance money as an accommodation?

The Referee: Don't put the words in his mouth.

A. That is just exactly what I did. We loaned money to take care of the bills.

The Referee: You drew all the checks?

The Witness: No.

The Referee: Who did draw the checks?

The Witness: James McHugh did.

The Referee: That is what we are talking [32] about. You and Mr. Tembreull drew some checks on this particular account?

The Witness: Yes, sir, but there was more put in there before——

The Referee: Well, before you drew a check, you had to say what it was for, and you drew money?

The Witness: Yes, sir.

The Referee: Did you solicit business?

The Witness: No.

The Referee: None.

The Witness: I think I could say——

The Referee: Well, anybody could say, but did

(Testimony of Albert A. Mayer.)

you solicit any business for McHugh Trucking Company?

The Witness: No.

The Referee: Never did?

The Witness: It might have been once or twice, but not as a business. We weren't interested. This was just an accommodation; if the truck would come in, we would lend assistance, but I did not want to interfere in the company—it was McHugh's baby. I told him I knew nothing about trucks, when we went into the organization — nothing about trucks, and he was to handle the truckers.

The Referee: Proceed with your examination.

Q. (By Mr. Simmons): How much money did you put into this [33] deal, besides the original $1,500, for which you were never repaid?

A. I would hate to make any attempt to say how much money that was.

Q. Was it the amount set forth in the petition for adjudication of bankruptcy?

A. That is right.

Q. I will ask you, did you ever get any money back as dividends, or as interest on your investment? A. No.

The Referee: Before we leave that, I would like an itemization of the $11,000 you say you put in there.

Mr. Simmons: That isn't a fair question.

The Referee: I know it. I will give him two weeks to do it, but he said he loaned them money. Do you want to give me the details?

(Testimony of Albert A. Mayer.)

Mr. Simmons: We will be glad to furnish the Court with an itemization of that.

The Referee: I want to know about these checks.

Mr. Simmons: Those would not be, Your Honor, that amount. That amount is funds advanced, or for which they were liable, which is not drawn out.

The Referee: For which they are liable? They are liable for everything, according to my theory.

Mr. Simmons: The Court has practically made a [34] ruling; that being true, I think maybe it is premature and I think the Court, before making a ruling, ought to hear a little bit about the law on the subject.

The Referee: I want the facts first, and I could issue the show cause order. He testified these men run this business, solicited funds, paid help——

Mr. Simmons: He testified——

The Referee: On that testimony, I could issue the show cause order, but what I want to know on that $11,000 is—is it wages, wholly; or is it money paid out for help while running the business? But whatever it is, I would like to know what it is for.

Is it money he paid out on behalf of the company?

Mr. Simmons: Yes.

The Referee: All right. Not in direct loans?

Mr. Simmons: Well it was treated as an advance to the company, to be repaid.

The Referee: The point is, he would have to be actively in control of the company to be in a position to pay out this money.

Mr. Simmons: No, getting behind is the term;

(Testimony of Albert A. Mayer.)

you try to keep him from getting behind and here these fellows, month after month, pour in money in the hopes of getting a return, and there is no return; and you finally get to the point where they can't even get their [35] own money back, or get hold of more, so that they were driven to the bankruptcy court to stop the stream from washing their credit out to sea.

The Referee: But where a man is going to pay out some $11,000 or more—before he does that, somebody has got to make some investigation, and that argues substantial control, in my opinion.

Mr. Simmons: Well, I might have a son who is a profligate, and I can pay out money to keep him out of trouble, but still I can't control him.

The Referee: All right. Proceed.

Q. (By Mr. Simmons): Mr. Mayer, I will ask you if the funds which you advanced from time to time in behalf of the company were required to keep the company in business? A. That is right.

The Referee: How do you know that?

The Witness: Well, because the payrolls weren't being met and the payments weren't made.

The Referee: You knew that? How?

The Witness: Well, because I would get notifications coming through the mail, or by the drivers.

The Referee: By whom?

The Witness: By the drivers, or by notifications coming in through the mail. [36]

The Referee: Did you talk those matters over with Mr. McHugh?

(Testimony of Albert A. Mayer.)

The Witness: Many times.

Q. (By Mr. Simmons): After this company proceeded in the hauling business, did McHugh live in Seattle or at Yakima?

A. To begin with, he lived in Seattle, at some hotel.

Q. Do you know when he moved over to Yakima?

A. Just shortly after starting—a month or six weeks.

Q. I will ask you if he, at that time, or any subsequent time, demanded the books and records be kept at Yakima?

A. He did later on, but just exactly when, I don't recall, but he did.

Q. I will ask you if, subsequent to that time, you were able to get any statement as to the financial condition of the concern?

A. Well, we get that by driving over and talking things over.

Q. Were you furnished with a statement by McHugh from time to time? A. No.

Q. Did you ask for it?

A. Yes, we would have liked to have had a statement, but weren't able to get it.

Q. Why weren't you able to get it? [37]

A. The whole darned thing wasn't set up properly.

Q. Why didn't yet set it up properly, if you knew it wasn't set up properly?

A. As I said, I don't know anything about trucking, and I think I know less today.

(Testimony of Albert A. Mayer.)

Q. Well, was it up to you to set it up properly?

A. No, it wasn't. We put in the investment, anticipating that McHugh knew the business—knew how to run it. We had all the confidence in the world in him, to begin with.

Q. Did you ever have occasion to ask McHugh to do something—anything connected with the operation, which he refused to do?

A. Oh, I couldn't say a direct refusal—it just never happened. If we asked him to do something, he never directly refused—it just didn't happen.

Q. Did you ever ask him to fire anybody?

A. I believe on one occasion. That happened when a guy was drinking, and he asked us how we felt about it; that is how that happened to come up.

Q. Did he always do what you recommended?

A. Well, in managing the trucking end, he did practically as he seen fit—in the operation of the trucks, practically as he seen fit; except for one instance when we had a truck up here for him; that is the only instance [38] in which we had anything to do with them.

Q. When did you first learn your trucking company business was going in the hole, or falling behind financially?

A. Well, there is always a lot of accounts out, and some of them uncollectible; still, there wasn't any time that the bills wasn't being met, but we had to come to the conclusion, without the anticipation of the uncollected accounts, we nevertheless found

(Testimony of Albert A. Mayer.)

out a short time before—in 1949—that we just couldn't go no farther; that is, we couldn't.

Q. You had been requested to come to the aid of the trucking company?

A. Well, the drivers would come over here—they would have to come over here for their pay, and when payments on the trucks and trailers come due.

Q. Did McHugh ever ask you or tell you about them?

A. At times; but he made a lot of them himself.

Q. Why did the company have an account in Seattle and one in Yakima?

A. Well, because of the payments to be made over there—labor, etc., and there is a lot of scattered industry over there—and he wanted his own account.

Q. Why did you maintain an account in Seattle?

A. That was in Seattle more for convenience, to begin with.

Q. Do you know of any general creditor, or any creditor, [39] rather, of this partnership—I suppose I should classify as a general creditor, myself—and when I say that, I mean somebody without a mortgage or contract—do you know of any such who extended credit to you individually or because you were a member of the firm, that hasn't been paid or isn't looking to you for payment, by lawsuit or otherwise?

A. Only from what I have heard, but not at the time of those contracts—I did not know that.

Q. Did you advise your creditors from time to

(Testimony of Albert A. Mayer.)

time—that is, the creditors of McHugh Trucking Company, when they would contact you, what the nature of the company was?

A. I did, yes, towards the last.

Q. When you say, "towards the last"—are there any creditors now who extended credit as though to you, without knowing that you were a limited partner?

A. Well, I don't know as that question ever came up, outside of Eckert Automotive.

Q. Do you know of any creditor of the McHugh Trucking Company, whose account was incurred subsequent to the 20th day of April, 1949, or rather, prior to the 20th day of April, 1949, who incurred that account in reliance upon your being a general partner, who has not been paid or who has not sued you in the superior court for payment? [40]

A. Well, I don't think any suit has been brought directly naming me as a general partner, if that is what you meant.

Q. No. Do you know what a general creditor is?

A. Yes.

Q. That is a creditor that just looks to someone to pay their debt, without having any security such as a mortgage or conditional sales contract or some such security under which the creditor could have recourse. Do you know of any such creditors of McHugh Trucking Company who extended credit to McHugh Trucking Company prior to the 20th day of April, 1949, whom you would classify as a general creditor?

(Testimony of Albert A. Mayer.)

A. In other words, that is someone looking to or depending on me for payment?

Q. Yes.

A. No, I don't, outside the contract at the bank and the Philippine Produce Co.

Q. The Seattle First National Bank has a chatel mortgage and the Philippine Produce Company has a conditional sales contract?

A. Yes, sir. Outside of those, I don't know of anybody.

Q. Why did you sign the mortgage down at the Seattle First National Bank?

A. Well, because they wouldn't sell McHugh the truck, by [41] himself—or rather, they wouldn't take the mortgage, so that we again came to the assistance of the company and *obliged* ourselves for that amount.

Q. You have been sued for the default on that by the bank for the unpaid balance of the note?

A. That is right.

Q. And you have been sued by the Philippine Produce Company for the unpaid balance of their note? A. That is right.

Mr. Simmons: I think that is all. Perhaps the Court has some questions.

The Referee: You started business about?

The Witness: The 23rd of June, 1948, I believe. Approximately that.

The Referee: This document—Exhibit 1—shows you opened the bank account July 26, 1948, so that it was about the first part of your business?

(Testimony of Albert A. Mayer.)

The Witness: Yes, sir.

The Referee: And then, the time you ceased to do business and filed the petition—well, I don't have the date of filing, but it was approximately April, 1950, or March. I think it was adjudged in March, 1950. That is, according to the schedule here.

The Witness: I think the petition was filed on the 22nd of January.]42]

Q. The Referee: These accounts here—do you know when they were incurred? Can you tell?

The Witness: I know some of them, but I don't know all.

The Referee: Some of them were incurred before April, 1949?

The Witness: I know the first one—the Philippine Produce Company is.

The Referee: In 1948.

Mr. Simmons: That is a secured account.

The Witness: Here is a lot of these I don't know anything about at all, and here are some I do recognize.

The Referee: Give me your best recollection of how you arrived at this figure of $11,611.19?

The Witness: How I arrived at it?

The Referee: Yes. You wrote it down—you must have arrived at it somehow.

The Witness: Offhand it is just too hard to say, without having the facts before me.

The Referee: Don't you know the method by which you arrived at this figure?

The Witness: That is the actual figure.

(Testimony of Albert A. Mayer.)

The Referee: Well, did you have a note for it—did you ever have a note for it?

The Witness: Have any note for it? No. [43]

The Referee: Do you have a note now?

The Witness: No.

The Referee: Well, do you have any knowledge of how you arrived at the figure?

The Witness: Yes, I could say that I will be able.

The Referee: And the method by which?

The Witness: Just by checking up and making a report.

The Referee: Did you pay the money to McHugh Trucking Company by your personal check?

The Witness: A lot of it, yes.

The Referee: Most of it?

The Witness: The greater share of it, yes.

The Referee: Was that greater share called that $11,000?

The Witness: What I am trying to emphasize if that $11,000 isn't paid——

The Referee: That isn't paid?

The Witness: I will leave that to the accountant to explain, and if I need to be here, I will certainly have——

The Referee: Counsel, we are to think of that as the overhead figure for which he will be liable?

Mr. Simmons: Mr. Judge Black ruled he was a creditor. [44]

The Referee: But from what you say that arose partly from the notes he signed, and the company didn't owe both of them.

(Testimony of Albert A. Mayer.)

Mr. Simmons: That is a volunteer assumption on——

The Referee: I don't know how you arrived at that. I don't know any of the details. It is quite a sum of money and I wish to understand how it was arrived at.

Then there is this $26.00 item he never brought up.

Mr. Simmons: Well, as I recall that, they sued McHugh Trucking Company for so much money and McHugh Trucking Company didn't have any money, so that in order to keep the trucks moving, Mayer and Tembreull paid the repair bills they had, not as their own indebtedness, and adding the $2200 to some other indebtedness, and dividing by two, they each contributed 50%.

The Referee: That is why I wrote that order, so that I could look at the debts to see if they were controlling the company—that is the point I am making.

Mr. Simmons: Wouldn't that become involved only under the circumstances if this trustee had a dividend to declare?

The Referee: Let's not worry about that. That is all. Call your next witness.

Mr. Anderson: Mr. Tembreull, will you take the stand? [45]

R. D. TEMBREULL

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Tembreull, going over the same matters—you gave the bank the combined authority? A. Yes.

Q. I see that is marked Trustee's No. 2. You also gave the bank Trustee's No. 1—the signature card? A. Yes.

Q. If these are not all of them, at least they are some of the ledger sheets returned to you by the bank — referring to the bank ledger sheets and checks? A. Yes.

Q. And those are canceled checks of your concern, which were executed by you and Mr. Mayer, and run through the bank, and later returned to you? A. Yes.

Mr. Simmons: In order that the record may be clear on this point, my objection as stated previously, will also apply to this interrogation of Mr. Tembreull.

The Referee: All right.

Q. (By Mr. Anderson): Now, did you glance at some nine stubs of check books, and can you state whether those are stubs of checks which were written by Mayer and Tembreull? [46]

A. Yes, they are.

Mr. Anderson: I will offer them in evidence as Trustee's No. ——

The Referee: Trustee's No. 4. They will be admitted.

(Testimony of R. D. Tembreull.)

(Whereupon, the documents above referred to were marked for identification as Trustee's Exhibit No. 4, and were received in evidence.)

Q. (By Mr. Anderson): Did you ever solicit any business for or on behalf of this concern?

A. I did not.

Q. You never went out to furnish any business for them?

A. There was a party I worked with whose wife was working at the Northwest Note & Bond, and I asked him to see his wife and have her find out if they could throw a little business to McHugh Trucking Company; if they would throw a little business to McHugh, it would be fine, but I never contacted Northwest Note & Bond.

Q. Who employed the accountants?

A. Through agreement with McHugh, Mr. Salonka was employed. He asked our advice, if he was trustworthy, and of course, Mr. Salonka had taken care of Mayer's books before; then McHugh took the books away from Salonka and brought them over to a person in Yakima.

Q. McHugh wasn't acquainted with Salonka in the beginning, [47] before he was employed?

A. To my knowledge, I don't think so.

Q. Were you acquainted with Salonka?

A. I think at one time, he made out an income tax statement, but I don't know.

Q. The fact is, you and Mr. Mayer sought out Mr. Salonka and asked him to audit the books and make up a statement?

(Testimony of R. D. Tembreull.)

A. The fact is, we weren't satisfied with the way McHugh was running the business and we asked to have a man who knew books take care of them; and he wanted advice on who would be a good one, and I said I didn't know; and Mr. Mayer suggested Salonka, who had always been fair and a good accountant. McHugh thought that a good idea at the time, but afterwards, he didn't think so and took them away from Mr. Salonka.

Q. Well, Salonka did give you an auditor's report? A. Yes, sir.

Q. Showing you one dated August 31, 1949, did he make that up for you and Mr. Mayer, at your request?

A. Well, I don't know whether or not this is the one that was made up in the case of Murray vs. McHugh Trucking Company, where we were sued—Mayer and I—and at the time, for the purpose of that suit, we requested a statement from Mr. Salonka. [48]

Q. Well, now, who furnished Salonka with the information contained in this statement?

A. This all came from the books.

Q. Came from the books of the concern?

A. Yes, sir.

Q. And you offered an exhibit like that in the case that you mentioned having been brought by Mr. Murray? You furnished the court with a statement similar to this one? A. I believe so.

Mr. Simmons: I think that is the one. It is the only one I have ever seen.

(Testimony of R. D. Tembreull.)

Mr. Anderson: I will put it in evidence.

Mr. Simmons: I might state for the Court that we were resisting an application for a receivership on this company in the superior court at that time.

The Referee: What date was that?

Mr. Simmons: It is about the date of this report, and the report is dated August 31, 1949, so it would be in the neighborhood of that date—maybe the 1st of September, or shortly after Labor Day. But at that time, the application was made by J. W. Murray for the appointment of a general receiver, and we were attempting to avoid the appointment of a receiver at Murray's behest; it being our theory that it was a joint venture, so [49] to speak, and he had no right to the appointment of a receiver thereof, and if he did have the right, it would be only on the specific truck in which he had an interest.

That matter was heard before Judge James, who had taken it under advisement, and after the briefs had been submitted, as I recall, ruled against a general receiver, but required us to hire a receiver to manage and operate the one truck in which Mr. Murray had an interest. Mr. Murray's counsel declined to proceed on this basis, and the matter has stood that way ever since, until the superior court receives the referee's report where a complete accounting had been made to Mr. Murray of the trips which the truck made—the truck in which he had the interest, and if funds were now due to Murray under the agreement, that have not been disposed

(Testimony of R. D. Tembreull.)

of—that matter is being handled by Mr. Derrig, the referee.

The Referee: Mr. William Derrig?

Mr. Simmons: An accountant named Derrig.

Mr. Anderson: I will offer the statement as Exhibit 5, an auditor's report.

The Referee: Trustee's 5. It will be received.

(Whereupon the document above referred to was marked for identification as Trustee's Exhibit 5, and received in evidence.) [50]

Q. (By Mr. Anderson): Did you ever drive a truck—any truck—for the company?

A. I never drove truck for the company.

Q. Never made any deliveries? A. No.

Q. Your name has appeared on any payroll?

A. No, I wasn't on the payroll. I wasn't on salary.

Q. You weren't on the payroll?

A. No, I received no salary.

Q. You did receive a number of checks from the concern? A. Yes.

Q. What were they given you for?

A. For loans to the company.

Q. All of them?

A. Some were for expenses, such as when McHugh requested us to come down to Yakima to offer our advice, for what it was worth.

Q. I didn't hear that?

A. Like gas and oil expense on trips when we would go down to Yakima to consult with him. He

(Testimony of R. D. Tembreull.)

was trying to show us where the company was making good money, but he always needed more money to pour into it.

Q. Some of these checks were in payment of your expenses in traveling over to Yakima?

A. Yes, he said if we would come down to consult with him, [51] the company would pay our expenses.

Q. He didn't pay them?

Mr. Simmons: You paid them.

A. Well, he authorized them.

Q. (By Mr. Anderson): You didn't need his authorization to get the money?

A. Well, he was running the company, and if he didn't authorize it, he would have raised the roof.

Q. All you had to do was to write a check?

A. Yes, but he would hear about it.

Q. He couldn't withdraw any money from this bank account—this man McHugh?

Mr. Simmons: Which bank are you talking about?

A. Well, McHugh took the account to three different banks at different times. There was this one in the Main Branch, Seattle First National Bank; there was one in the Yakima Valley Branch of the Seattle First National Bank; and there was one of them, I believe, in the Westside Bank in Yakima.

On the account at the Main Branch, Seattle First National Bank, the account was started by Mayer and myself so that McHugh—well, the agreement was that when he would be gone, the driver or some-

(Testimony of R. D. Tembreull.)

one would call up from Yakima and say there is something coming due, and he is down at Los Angeles, and it should be paid. [52] He was on the road at different times, and when he moved over to Yakima that account was opened up down there—McHugh opened that one up, and it still required the three signatures—no, he started that without the three signatures so that if he was out of town, drumming up business—he run over eight states, he could call us up and have us issue the check for something that needed to be paid, or the driver would come in and tell us. However, that didn't apply with the new account when he moved the account to the Westside Bank. He was the only one who could sign that.

Q. Now, when you went to get equipment so that this concern could operate, did you and Mr. Mayer pick out this particular equipment?

A. McHugh was the one who passed on what equipment should be bought.

Q. Did you and Mr. Mayer go out with him to pick the stuff out?

A. Sometimes we were with him, but he was the one who had the final O.K. on what truck equipment was needed.

Q. He being a trucking man would, for example, would advise that this truck would be a good buy, but he would consult with you and Mayer before he bought it?

A. The only reason he called was the reason there wasn't enough money. [53]

(Testimony of R. D. Tembreull.)

Q. When you bought the '48 Federal, all three of you were there and you said among yourselves, "Let's take it"?

A. No, this is one he wanted. He said, "I can get a lot of business for it, with the flat bed like this, and I can make these trips and I will drive it myself, if you will put up the money."

Q. You looked the truck over before buying it?

A. I looked at it, the same as I would look at a car, but I don't know anything about them, so that any advice I would give wouldn't be worth much.

Q. Who bought the truck and trailer from the Philippine Produce Company at Wapato? Did you look at it?

A. Seems to me I saw it during the course of the negotiations. McHugh contacted us quite a few times before I ever saw it, or went down there. However, the Philippine Produce Company—I forget, is that the right name—anyhow, they, offhand, refused to do anything and we were so advised by McHugh; and a fellow by the name of R. Baldon, I think it was, he wouldn't sell to McHugh Trucking company, but if we personally indorsed the deal, then he would.

Mr. Anderson: That is all.

Cross-Examination

Q. (By Mr. Simmons): If the Court is through with the files, I think it [54] might be enlightening to go into the history of these trucks. What was the first truck, Mr. Tembreull?

(Testimony of R. D. Tembreull.)

A. The Federal, the same one we are talking about.

Q. Where did you get the Federal truck?

A. From Eckert Automotive.

Q. Who negotiated the purchase?

A. McHugh, mainly.

Q. And the next one—which one was that?

A. That was the Reo.

Q. Where did you get the Reo?

A. I don't remember, offhand, the name of the company—it was the company at 14th and Marion. It was some friend of McHugh, that he had done business with for quite some time, a Jewish fellow, and I think he is since dead.

Q. What was the third truck you bought?

A. That was a Peterbilt.

Q. Where did you get the Peterbilt?

A. I think that was Eckert. We were down there, I know, talking to somebody about it.

Q. And the other truck?

A. That was a '44 tractor—a Peterbilt—that was Murray's truck.

Q. That was by the arrangement as outlined before?

A. Yes, and also No. 2—with Davis, under the same arrangement as the Murray truck. [55]

Q. Did you have a further truck?

A. No. 5 was the International—the Philippine Produce Company truck.

Q. Was that bought under conditional sales contract—the Philippine Produce Company truck?

(Testimony of R. D. Tembreull.)

A. Yes, sir.

Q. In each instance, McHugh initiated the purchase?

A. Yes, with, I believe, one exception, the answer should be definitely, yes. The first one—Murray happened to be my partner in some work at the time—not my business partner—but he asked me one day how I would like to have another truck. I told him I didn't have anything to do about it, but what was the score? So he told me that he and his wife—if they put up some money to put on a truck, could they share in the profits? I said I didn't know, but I will tell McHugh.

Mr. McHugh was driving taxicab at the time, and quite often he would come down there to our district and Murray would ride around in the back of the car, McHugh explaining things to Murray, and finally Murray put up the money.

Q. Did you ever hire or fire anybody working for this company? A. No.

Q. Who did the hiring? [56]

A. McHugh.

Q. Did you tell him, or did you direct what companies they would haul for, or where the trucks would go?

A. No, McHugh would get the loads. He would designate where the loads would go and tell the drivers what to do.

Q. As I understand it, your expected income was from hauling payloads of merchandise or produce, and getting the revenue for it?

(Testimony of R. D. Tembreull.)

A. Yes, sir.

Q. The Court asked Mr. Mayer about this indebtedness. Were you and Mr. Mayer claiming in the petition, an equal amount of indebtedness from the copartnership? And are you able to itemize that indebtedness?

A. Some of it I can, offhand; but the rest of it, I can't unless I get together with the auditor.

Q. But you will get that for the Court?

A. Yes, I could tell some of it right now.

Q. All right, go ahead.

A. I remember McHugh saying, "We are going into the winter months and we have got open trailers, and we want closed trailers." He knew a party down in Portland who had a trailer for $3500, and we borrowed the money from the First National Bank—Seattle First National.

A. In whose name?

A. Mayer and Tembreull only, personally. And that money [57] was used to pay cash down for the trailer.

Q. How much? The whole $3500.

A. Yes. There was another time—I forget the name of the insurance company, offhand, but they kept after McHugh and they were going to cancel the insurance, and the Seattle First National Bank said those trucks had to be covered.

Q. There were still payments coming due?

A. Yes, and they came after us personally, and we told McHugh, and he said, "well, those trucks have got to roll", and he said, "if we had a little bit

(Testimony of R. D. Tembreull.)

more money", so we went to the bank and borrowed $2,000 and paid the insurance.

The Referee: You mean, McHugh?

The Witness: Mayer and I, personally.

The Referee: McHugh didn't borrow?

The Witness: They wouldn't let him; and the rest, it was paid out for the expenses of McHugh Trucking Company.

The Referee: They would loan the money and you would pay it out as required?

The Witness: Yes. There were other items that were advanced from time to time to the company when it ran short of money, on the promise of McHugh that there was more business coming in, or that was to come in to [58] *to* the company, to help take care of the expenses.

The Referee: In other words, did you take this money and deposit it in the McHugh Trucking Company account in the Seattle First National Bank?

The Witness: Some of it, was, Your Honor.

The Referee: And then you drew it out?

The Witness: Yes, sir.

The Referee: Exhibit 4—are the checks by which you drew this money out?

The Witness: Yes, sir.

The Referee: Without counting them, each book has how many?

The Witness: Twenty-five, I believe, Your Honor, something like that. Some of them are just like when McHugh would call us up and say the driver has to have money, and you wouldn't want to issue the whole amount in one check, so we would

(Testimony of R. D. Tembreull.)

have to give him three, four or six $25 checks.

The Referee: The drivers would contact you or Mr. Mayer before going on trips?

The Witness: Very seldom.

The Referee: I want to know, Mr. Tembreull, just what initiated the payment of these checks. From where did you get permission to pay out the money?

The Witness: Well, McHugh would tell us. [59]

The Referee: But he was over at Yakima.

The Witness: No, he was back and forth.

The Referee: Just tell me what happened, if you know.

The Witness: I don't understand.

The Referee: I want to know who initiated these payments.

The Witness: When we first started, McHugh wanted this checking account, opened, as he was going to be off on the road—back and forth, and he wanted it so that he could call us and have the checks made out. In the beginning, the invoices and bills went to 552—I have forgotten the street—to McHugh's home. Then, when he moved to Yakima——

The Referee: When was that?

The Witness: I don't remember, offhand, but it was when the fruit season was supposed to start. Sometime in August—the latter part of 1948—and for the same reason, he would either be off making a trip and he wanted those bills able to be paid, and that is the reason he would come in. He wanted checks issued for gas and oil and for expenses, to be used on trips down to Los Angeles, by him or one of the other drivers.

(Testimony of R. D. Tembreull.)

The Referee: But these checks issued to drivers, and I suppose, to people supplying you with materials— [60] I haven't checked them, but there seems to be a considerable amount of them—indicates that they were general expenses of the McHugh Trucking Company?

The Witness: Yes, sir.

The Referee: I still don't know from whom you got the authority to pay out these checks——

The Witness: Nobody else gave the orders—McHugh was the only one who directed the policy of the company.

The Referee: But you took the responsibility to pay out the money on the checks, yourself?

The Witness: Well, I would know what bills were due, and he would leave instructions to pay them.

The Referee: I am not clear on this. In the beginning, the invoices and bills went to McHugh's home at 552 some street or other in Seattle, and after that?

The Witness: Then, as long as he was going to be on the road and his wife was living at a hotel—the Don Lee, and before that they lived in an auto court and moved into the Don Lee Hotel, and he would be back and forth on the road—as long as his wife would be alone there, all the mail was arranged to come to 626——

The Referee: Where is 626?

The Witness: At 13th Ave. North. That is where Mr. Mayer and I live.

(Testimony of R. D. Tembreull.)

The Referee: How long did the mail come there?

The Witness: Until McHugh got established so that he had a permanent residence at the hotel.

The Referee: Did you get mail at your home address for the company?

The Witness: That is where it did come.

The Referee: To your home, Mr. Tembreull?

The Witness: Yes, temporarily.

The Referee: Well, that is all the headquarters you had at the time?

The Witness: Yes, sir.

The Referee: And that was between September, 1948, and April of 1949?

The Witness: No, I don't think it came quite that long, Your Honor.

The Referee: Well, when?

The Witness: That came off and on; there would be one come and it would all be forwarded to McHugh.

The Referee: Then when an invoice would come in for a shipment of supplies, you would send a check?

The Witness: If it had McHugh's O.K. on it.

The Referee: If you knew about it, you would pay?

The Witness: That is right, but if it didn't have McHugh's O.K. on it, I would wait until I got his O.K. to do so.

The Referee: That is all. [62]

Mr. Simmons: I have nothing further.

(Witness excused.)

JAMES E. McHUGH

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Will you give your full name? A. James E. McHugh.

Q. And your residence?

A. Yakima, Washington.

Q. You operated this business known as McHugh Trucking Company? A. Yes, sir.

Q. This equipment you used in the operation of it—did you buy that yourself, or did you, Mayer and Tembreull look it up, discuss it, and buy it?

A. We looked at it together; then bought it.

Q. Now, who deposited all the money in the Seattle bank?

A. Mr. Mayer and Mr. Tembreull.

Q. Did you deposit any? A. No.

Q. Did you check out any? A. No.

Q. You had a bank account at Yakima?

A. Yes, sir. [63]

Q. You deposited money in that?

A. What deposits there were.

Q. And you checked it out?

A. Well, the three of us wrote checks there.

Q. The three of you? A. Yes, sir.

Q. And if two names appeared on a check, it was a good check, Mr. McHugh?

A. No, in Yakima you only had to have one signature.

Q. Only had to have one? A. Yes, sir.

(Testimony of James E. McHugh.)

Q. Did Mr. Mayer or Mr. Tembreull ever dig up any business for this concern?

A. Oh, yes, some.

Q. Did they dig it up in Yakima, Seattle, or where? A. No, not in Yakima—in Seattle.

Q. Did they solicit orders and obtain orders for delivery of merchandise?

A. Yes, they talked to customers a few times, but very seldom.

Q. Who fired the employees?

A. Well, I did, most of the time. I think on one occasion Mr. Mayer did tell me to.

Q. Some of the time did Mr. Mayer hire?

A. No, he would suggest someone, but I don't think he ever [64] hired anyone.

Q. And when it came to firing someone?

A. It was the same thing.

Q. Either one of these two men——

A. If there was someone didn't do the work properly, they would say, "let him go" and we did.

Q. The only truck remaining on hand is a certain International Truck and trailer?

A. Yes, sir.

Q. Aren't the wheels on that truck and trailer?

A. Yes, sir.

Q. Well, when did they get on it? Did you have the wheels brought over——

A. The other wheels, we had to put some on it.

Q. I was over there in December and I saw the truck and trailer. Were the wheels on the truck and trailer last December?

(Testimony of James E. McHugh.)

A. Just enough to move it, yes.

Q. Well, where are the wheels that are missing?

A. There are some down at Sarber Tire.

Q. How many?

A. There were three down there.

Q. Where is that place?

A. First South and Yakima.

Q. And are the tires on the wheels? [65]

A. Yes, sir.

Q. Are those the tires on the trailer, or on the truck?

A. There is two missing on the truck and four missing on the trailer—six tires.

Q. There are three down at one place?

A. And three over at Richardson Tire Company.

Q. What is that address?

A. I don't know the exact address.

Q. Is that a garage or a service station?

A. That is a tire company.

Q. Are all parts of the engine there at Fairchild's?

A. Yes, we had the truck torn down to do some overhaul on it when it was tied up in this litigation, and the parts were taken into the garage, and after it was released, as I hear, the parts were put back in the van and they were still there when it was moved over to Redmon-Fairchild.

Q. This matter of the accountant, Salonka. Did you hire him?

A. I didn't. He was the second accountant; the first accountant was hired——

(Testimony of James E. McHugh.)

Q. Who hired the first accountant?

A. Mayer and Robert. Robertson—he sued us to get his money shortly afterward.

Q. Did you know the man before he went to work for you? [66]

A. Never met the man, at no time.

Q. How did you meet the man?

A. After Tembreull and Mayer hired him.

Q. You never met him before, at all?

A. No.

Q. How about legal services—who was attorney for this company?

A. Well, Mr. Simmons was attorney for Mayer and Tembreull, and Mr. Beardsley was my own attorney. That is, when we organized the company.

Q. Well, before this matter came up, did you ever do any business with Mr. Simmons?

A. No.

Q. Who took you to his office?

A. Mr. Mayer and Mr. Tembreull.

Q. Did you ever do any business with Karl Heideman? A. I don't believe so.

Q. You don't know him?

A. I had Karl Heideman years ago, but for this company, I never did.

Mr. Anderson: I think that is all.

Cross Examination

Q. (By Mr. Simmons): Didn't you have a lawyer in Yakima for this company?

A. Yes, Mr. Splawn. [67]

(Testimony of James E. McHugh.)

Q. At the time Mayer and Tembreull were about to put their money into this venture, they asked that certain papers be prepared by me, or by my office?

A. I believe so.

Q. And you, at that time, were represented by Bill Beardsley? A. By Mr. Beardsley, yes.

Q. When this application for receivership came up, wasn't it agreed that I represent the company at that hearing? The hearing when Murray sued for receivership? A. Yes.

Q. And at the time when the company's accounts were all tied up, or garnisheed, didn't you come to my office to see if I couldn't help you out?

A. Yes, I did.

Q. And they had sued to garnishee the company's money? A. Yes, sir.

Q. And I spent a great deal of time ironing that out, for the benefit of the three of you, and the company, too? A. That is right.

Q. Well, now, at the time somebody by the name of Whitey sued you to try to sell the permit of the company, was it your notion I should represent you at that time, and save those permits?

A. I don't think that was me—I was in California at that time that took place, because when I came back, I [68] inquired.

Q. Well, did you desire to hire somebody else?

A. I don't recall that at all. I know we had some papers——

Q. The papers were served at Yakima and you had them forwarded to me?

(Testimony of James E. McHugh.)

A. That was here in Seattle that it first started. I may be wrong, but I think so.

Q. I had to take the matter up with the authorities at Olympia to preserve the permits, which were in your name. Now, when this started, all you had were the permits? A. That is right.

Q. That is all you ever put into the company?

A. I wouldn't say that, as I put in a lot of time, too.

Q. Well, you invested no dollars and cents?

A. No, not at all.

Q. But you had these permits which you thought could be profitably used if you could get financed?

A. Yes, sir.

Q. You sought out Mayer and Tembreull to see if they wouldn't finance you?

A. They sought out me—it was vice-versa here.

Q. Did you, or did you not desire to utilize the permits which you held?

A. I didn't for two years. I wasn't in a big hurry to go back in, until I met Tembreull through some friend, and [69] he happened to ask if I had a company on Dearborn St., and I said, "Yes". Then he said did I know a man by the name of Al Mayer, who used to do a lot of some kind of work—I forget what it was—and he said, "Al is my partner". And the next night, or very shortly after, I dropped over to see Mr. Mayer, because I hadn't heard of him for a couple of years.

Mr. Nelson: Is this material?

The Referee: I don't see that it is material, but if Mr. Simmons——

(Testimony of James E. McHugh.)

Q. (By Mr. Simmons): Your relations were very friendly?

A. Yes. We had a dispute towards the last about a bill that was never paid; he claimed some other contractor ordered it and he never did get it, but we never had no trouble over it.

Q. When you went to see him, did you see if he was interested in helping you to get started again?

A. Mr. Tembreull suggested that in our first conversation—that if I had the permits, they would finance me with the permit, if I didn't have it in use.

Q. That is how this thing originated?

A. Yes, sir.

Q. You entered into a limited partnership? You were to be the general partner and manage the truck company?

A. That is right, but I can't see it ran that way. [70]

Q. From time to time, as a matter of practice, the $3000 these men put in proved to be very inadequate—very insufficient?

A. There was a couple of times, and the insurance was inadequate, but a lot of this I don't understand, that was added into the company as we went along.

Mr. Simmons: I think that is all.

Redirect Examination

Q. (By Mr. Anderson): Let me ask you, Mr. McHugh, what are you doing now?

(Testimony of James E. McHugh.)

A. Well, I am working extra board for United Freight Lines.

Q. Do you have any truck operations?

A. I have one, operating for myself.

The Referee: I think that is immaterial in this hearing.

Mr. Anderson: I don't think so, in this hearing.

The Referee: Was any substantial part of these debts which are in the schedule of McHugh Trucking Company, incurred before April of 1949?

The Witness: I am sure I can't answer that.

The Referee: To what extent did Mr. Mayer and Mr. Tembreull enter into the management of the company before April, 1949?

The Witness: Well, in buying various parts we had to buy, such as tarps and chains—they were bought just [71] wherever they wanted to buy them; and then, the insurance—that was one of the items. I have an insurance agent by the name of Chester Forshee to keep the insurance alive—I had Forshee as my agent, and they had an agent by the name of Dobson, or something like that, and he handled our insurance, which was very costly on a long haul basis.

The Referee: At whose specific request, if any, did they make those payments by check out of the account in the Seattle First National Bank?

The Witness: I didn't get that.

The Referee: By whose request, if any, did they make those payments by check out of the Seattle First National Bank? They made a number of pay-

(Testimony of James E. McHugh.)

ments on behalf of the company out of the Seattle First National?

The Witness: Yes, sir.

The Referee: How was that initiated?

The Witness: Well, just whatever they wanted to pay—whenever there was a payment or some certain bill—they paid it.

The Referee: On their own initiative?

The Witness: Yes, sir.

The Referee: Was there any change in their participation in the management as of April 20, 1949?

The Witness: Well, they took one truck out from [72] under me, out from Yakima while I was in Salt Lake City, soliciting business.

Mr. Simmons: I will object to that, as not responsive to the question.

The Referee: During the time you were soliciting some business, what happened to the truck?

The Witness: They leased it out.

The Referee: To whom?

The Witness: To Exley, in Portland, and it was a matter of about six weeks or two months before I got the truck back in our own business. We were paying 10% for state loads and when we had our own loads out of Yakima. And they collected the money in Portland. I waited here in Seattle while they drove to Portland to collect the money and they deposited it in their bank and I never did see the money.

The Referee: About when was that?

(Testimony of James E. McHugh.)

The Witness: January, February and March of 1949.

The Referee: That is all I have.

Redirect Examination

A. (By Mr. Clemans): Mr. McHugh, concerning the approval of the bills to be paid by check, what was the arrangement for their approval? You have heard Mr. Mayer and Mr. Tembreull say you approved them? [73]

A. I didn't approve them. If there was a bill, if the money was in the bank, they would go ahead and make the payment.

Q. Who would contract for the bills?

A. Well, at Seattle First National, it was the three of us.

Q. No, suppose they made out a check to a supplier for gas or something like that, would that be something you would contract for?

A. No, some of these bills were service stations, and a few others. I never had anything to do with them.

Q. How about routing of trucks, and loading and pickup of loads by drivers?

A. I had charge at Yakima. They would ask me where is my next trip, or what to do next.

Q. Mr. Tembreull stated on some occasions he would get expense money for going to Yakima to converse with you concerning policy. What were those matters?

A. Oh, two or three times a week, he used to fly over by Northwest Airlines—at various times.

(Testimony of James E. McHugh.)

Q. According to the check book, he wrote an expense check on the hotel?

A. Well, that was on an airline trip.

Q. When they gave money, or put money into the company, did they turn it over to your control?

A. I didn't get it.

Q. I will ask you, did they put $22,000 into the company, in your opinion?

Mr. Simmons: Object to the question as wholly immaterial.

Q. (By Mr. Clemans): Do you know if they put in $22,000? A. No.

Q. When they put money into the company were there any strings on it, or did they give it to you to handle in your way?

A. It was put in the Seattle First National Bank, where they could write checks.

Q. Could you write checks? A. No.

Q. Did you ever ask to write checks?

A. No.

Q. Why were you not authorized to write checks?

A. It never made much difference. The three of us were in it, and if they wanted to handle the money it was perfectly all right with me. They could handle it as well as I could. At Yakima—they would send checks over from this bank for me to deposit over there.

Mr. Clemans: That is all.

The Referee: That is all. You are excused.

(Witness excused.) [75]

MELVIN MOSS

being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Will you state your name, please? A. Melvin Moss.

Q. Where do you live? A. Wapato.

Q. Were you a driver connected with this McHugh Trucking Company? A. Yes, sir.

Q. When did you first become connected with the McHugh Trucking Company?

A. When they bought the International Truck from the Philippine Produce Company.

Q. Who asked you to drive for McHugh Trucking Company?

A. It was either Mr. Mayer or Mr. Tembreull asked me when I was on the truck. I don't remember which one of them it was asked me to go to work.

Q. It was agreed you would drive the truck afterwards? A. Yes.

Q. To what extent—how much volume—did they order and direct you to carry on?

A. Mr. McHugh was out of town and they would come over and say to go here and go there. You see, we were hauling [76] into Idaho and into Oregon—different places.

Q. Did they come over reasonably often?

A. Yes.

Q. Did you—or rather, would you have any knowledge of either Mr. Mayer or Mr. Tembreull getting business for delivery?

(Testimony of Melvin Moss.)

A. Well, they would go to Pacific Fruit at Yakima when McHugh was out of town, and contact them for loads.

Q. They would get orders for delivery from Pacific Fruit? A. Yes.

Q. Anybody else?

A. Not to my knowledge.

Q. When McHugh was out, he would be driving different trucks to Salt Lake City and other points?

A. Yes.

Mr. Anderson: That is all.

Cross Examination

Q. (By Mr. Simmons): Do you know whether or not Mayer or Tembreull, either of them, were given instructions by McHugh to do the things you say they did? A. I don't get that.

Q. Do you know whether or not McHugh gave them instructions to do what you said they did?

A. No. [77]

Q. Do you know whether or not they had any instructions from McHugh to tell you what to do?

A. No.

Q. You don't know that? A. No.

Q. Do you know how the company happened to be hauling from Pacific Fruit?

A. No, they was hauling for them when I went to work there.

Q. As a matter of fact, that was McHugh's account? A. That I don't know.

Q. Their headquarters were at Seattle?

(Testimony of Melvin Moss.)

A. Right—whose headquarters were at Seattle?

Q. Pacific Fruit Company.

A. Yes, but it wasn't coming out of Seattle.

Q. I asked if you knew where their headquarters were? A. Yes, Seattle.

Mr. Simmons: I think that is all.

The Referee: You may step down.

(Witness excused.)

Mr. Nelson: I think that is all, for the trustee, at least.

Mr. Simmons: We have nothing further to offer.

The Referee: I will hear from you, Mr. Simmons.

Thereupon, after oral argument by Messrs. Simmons, counsel for Albert A. Mayer and R. D. Tembreull, and [78] Anderson, counsel for Trustee William Steinert, the Referee stated as follows:

The Referee: I will enter a formal order for them to file schedules.

(Thereupon, the hearing was concluded at 5:40 o'clock p.m., January 12, 1951.) [79]

[Endorsed]: Filed February 28, 1951.

[Endorsed]: No. 13,215. United States Court of Appeals for the Ninth Circuit. Albert A. Mayer and R. D. Tembreull, Appellants, vs. William J. Steinert, Trustee in Bankruptcy of McHugh Trucking Company, a limited partnership, and James E. McHugh, General Partner, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 28, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,215

ALBERT A. MAYER and R. D. TEMBREULL,
Appellants,

vs.

WILLIAM J. STEINERT, Trustee in Bankruptcy of McHugh Trucking Company, a limited partnership, and James E. McHugh, General Partner, bankrupt,
Appellee.

STIPULATION AS TO CLAIM OF CREDITORS

It is hereby stipulated by and between J. Lael Simmons and Nelson R. Anderson, counsel for the parties herein, that there are on file with the referee in bankruptcy creditors claims against the McHugh Trucking Company which well exceed five hundred dollars ($500.00) after deducting therefrom the value of all the assets of both the firm and of James McHugh, general partner, which are available in satisfaction of said creditors claims.

/s/ J. LAEL SIMMONS,
Attorney for Appellants.

/s/ NELSON R. ANDERSON,
Attorney for Trustee.

[Endorsed]: Filed Jan. 11, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

POINTS ON WHICH APPELLANTS RELY

Appellants hereby set forth a statement of the points on which they intend to rely on the appeal of the above-entitled cause, to-wit:

I.

The referee in bankruptcy was without authority and lacked jurisdiction to enter an order adjudging appellants to be general partners in the firm of McHugh Trucking Company and directing them to file bankruptcy schedules.

II.

The referee in bankruptcy misconstrued the law when he found appellants to be general partners in the firm of McHugh Trucking Company.

III.

The District Court erred in refusing to vacate the adjudication and dismiss the petition in bankruptcy against the McHugh Trucking Company upon application of appellants after affirming the order of the referee which held that appellants were general partners in McHugh Trucking Company.

/s/ J. LAEL SIMMONS,
Attorney for Appellants.

[Endorsed]: Filed Jan. 11, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 19 (6) of the rules of practice of this court, appellants in the above-entitled cause hereby designate the portions of the record, proceedings and the exhibits to be printed and contained in the record on review, as follows:

1. Creditor's Petition (including Exhibit A attached thereto).
2. Answer to Creditor's Petition.
3. Adjudication of Bankruptcy.
4. Order of Reference.
5. Oral Decision by District Court (pages one and two and page three down to and including line 21).
6. Special appearance by appellants.
7. Referee's Certificate on Review.
8. Trustee's Petition.
9. Order for Examination of Bankrupt and Order to Show Cause.
10. Order Directing Albert Mayer and R. D. Tembreull to file Bankruptcy Schedules.
11. Petition for Review (do not print Exhibit A thereto attached).
12. Transcript of Hearing on Order to Show Cause.
13. Order by District Court Affirming Referee's Determination.
14. Order of District Court Reaffirming Original Order with Leave to Attack Petition.
15. Cost Bond on Appeal.

16. Notice of Appeal.
17. Order Denying Motion to Dismiss.
18. Memorandum Opinion.
19. Notice of Appeal.
20. Stipulation and Order Extending Time for filing Record on Appeal.
21. Statement of Points on Which Appellants Rely.
22. Stipulation as to Claims of Creditors.
23. This Designation.

/s/ J. LAEL SIMMONS,
Attorney for Appellants.

[Endorsed]: Filed Jan. 11, 1952. Paul P. O'Brien, Clerk.

No. 13,224

IN THE

United States Court of Appeals

For the Ninth Circuit

LYLE WOOLLOMES,

Appellant,

vs.

ROBERT A. HEINZE, Warden of the California State Prison at Folsom,

Appellee.

BRIEF FOR APPELLEE.

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No. 13,224

IN THE

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vs.

ROBERT A. HEINZE, Warden of the California State Prison at Folsom,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

On August 2, 1951, Lyle Woollomes filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division (R. 1). On August 8, the Court issued an order to show cause (R. 47). The State of California filed a return to the order to show cause and a motion to dismiss (R. 66, 48). Judge Carter dismissed the petition (R. 79). A certificate of probable cause was granted and the appellant appeals *in forma pauperis* (R. 90, 91).

STATEMENT OF THE FACTS.

The history of the *Woollomes* case goes back to February 23, 1938. A little after midnight on that day two men held up the Burp Hollow Cafe in Los Angeles and killed the proprietor. Woollomes and a man named Lariscy were convicted of the robbery and murder. The death sentence was imposed and the California Supreme Court affirmed the conviction.

People v. Lariscy, 14 Cal. (2d) 30, 92 Pac. (2d) 638.

One of the points argued to the California Supreme Court concerned the sufficiency of the evidence identifying Woollomes as the man who committed the crime. The Court held that the identification was sufficient.

Subsequent to the conviction Governor Olsen commuted Woollomes' sentence to life imprisonment (R. 68). The basis of the commutation was the affidavits of several eye witnesses to the crime who had not been called at the trial. These affidavits were to the effect that Woollomes was not the man involved (R. 68).

This was in April 1940.

In 1950 Woollomes petitioned the California Supreme Court for habeas corpus. The petition was denied without opinion. The United States Supreme Court denied certiorari.

On August 2, 1951, Woollomes filed his present petition in the United States District Court for the Northern District of California, Northern Division (R. 1).

The facts alleged in the petition are the following:

(1) After the conviction it was discovered that seven eye witnesses to the crime had not been called by the prosecution (R. 5).

(2) These witnesses were interrogated and signed affidavits that in their opinion Woollomes was not the man who committed the crime (R. 12-31).

(3) The affidavits were presented to the trial jurors who then signed affidavits that if this evidence had been produced they would have voted for an acquittal (R. 5, 31-43).

(4) Prior to the trial some of Woollomes' friends, upon advice of counsel, demanded of the Police Department and the Coroner's office the names of all the witnesses to the crime, but the police officials did not disclose the names of these witnesses (R. 6).

(5) These friends then went over the records in the Police Department and the Coroner's office and found only the names of the witnesses who had appeared at the preliminary hearing (R. 7).

(6) After the trial the friends again went to the Coroner's office and this time they found a list of ten or more other witnesses (R. 44).

(7) They complained to the District Attorney and he told them that it was not an unusual procedure to withhold the names of witnesses (R. 95).

An order to show cause was issued (R. 47). The State of California filed a return to the order to show cause setting out the judgment of conviction, commit-

ment, and commutation of sentence (R. 66). A motion to dismiss the petition on the ground that the petition failed to state a claim upon which relief could be granted was also filed (R. 48). The motion to dismiss was granted and Woollomes appeals (R. 79, 84).

APPELLANT'S ARGUMENT.

I. The conviction is invalid because the prosecution knowingly suppressed evidence which if presented would have resulted in an acquittal.

II. The appellant has exhausted his state remedies because he has petitioned the California Supreme Court for habeas corpus and the United States Supreme Court has denied certiorari.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The appellant has not exhausted his state remedies as required by 28 U.S.C. 2254.

A. The appellant has not properly sought to invoke the corrective process of the State of California because his petition for habeas corpus to the California Supreme Court did not conform to the procedural requirements necessary for that Court to entertain the petition.

B. The appellant is required to submit a petition to the California Supreme Court which will comply with its procedural requirements because the federal

courts cannot speculate on what the California Court will do with a properly presented petition.

C. Even if the California Supreme Court had reached the merits and denied the appellant's petition for habeas corpus on the ground that too much time has elapsed, the appellant would still not have exhausted his state remedies since he had a remedy under the law of California at one time and failed to avail himself of it.

II. In any event the Federal District Court properly denied the petition because the petition did not allege facts which, if true, would show that the appellant had been denied any right under the United States Constitution.

ARGUMENT.

I. THE APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES AS REQUIRED BY 28 U.S.C. 2254.

A. The appellant has not properly sought to invoke the corrective process of the State of California because his petition for habeas corpus to the California Supreme Court did not conform to the procedural requirements necessary for that Court to entertain the petition.

The State of California will afford relief to one whose conviction was secured by the knowing use by the prosecution of perjured testimony or the suppression by the prosecution of evidence material to the defense. *In re Mooney,* 10 Cal. (2d) 1, 73 P. (2d) 554; *Mooney v. Holohan* (1934), 294 U.S. 103. If a state prisoner by appropriate procedure presents such

an issue he will be given a hearing to determine the truth of his allegations. *In re Mooney, supra.* The appropriate procedure is by writ of habeas corpus. Until a prisoner has properly invoked this procedure and been denied relief he has not exhausted his State remedies and the Federal District Court in absence of special circumstances must not entertain his petition for habeas corpus. 28 U.S.C. 2254.

California has of necessity developed certain procedural requirements which must be followed if one is to obtain this relief by habeas corpus. For example, the petition must be verified (Calif. *Penal Code* 1474); it must set out all prior applications for the writ (Calif. *Penal Code* §1475); it must detail the facts on which a conclusionary allegation is based (*In re Swain* (1949), 34 Cal. (2d) 300, 302, 209 Pac. (2d) 793); and if it is a belated attack it must set forth some explanation for the delay (*In re Swain, supra,* 302, 304; *In re Razutis,* 35 Cal. (2d) 532, 536, 219 Pac. (2d) 15). If a petitioner does not comply with these procedural requirements he has not given the State of California a chance to afford him relief. What is more important here, California has in no sense denied him relief. Until California has denied him relief a Federal Court has no jurisdiction to entertain the petition in absence of special circumstances of extraordinary urgency.

Woollomes' petition to the Supreme Court of California failed to comply with these procedural requirements. The specific procedural requirement with

which he failed to comply is stated by the California Supreme Court in *In re Swain, supra,* p. 304.

> "We are entitled to and do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned *and that he fully disclose his reasons for delaying in the presentation of those facts.* This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.
>
> The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified." (Emphasis ours.)

An examination of the petition will disclose that all the facts relied on were known to the appellant and his attorneys in 1939. As a matter of fact they were used to secure the commutation of the death sentence. They were not then used to attack the judgment. And yet the petition does not offer or attempt to show any reason for the 12-year delay.

The appellant contends that the reason for the delay is obvious. His valid term for robbery expired in 1949 and in 1950 he started his attack on the invalid murder judgment. He argues that he could not attack the invalid term for murder until he had served the valid robbery term. He contends that this proposition is so well known that the California Su-

preme Court must have notice of it. Concededly such a proposition is well established. (*McNally v. Hill* (1934), 293 U.S. 131.) But the proposition can have no application here. The evidence allegedly suppressed by the prosecution would establish that the appellant was not present at the scene of the crime. If his murder conviction is void, of necessity his robbery conviction is also void. There is no reason why the appellant could not have attacked both convictions in 1940. Since there has been a delay of eleven years the appellant must under the California procedural rules undertake to explain the delay. Until he has submitted a petition that conforms to the procedural requirements he has not exhausted his state remedies. No exceptional circumstances are alleged to obviate the necessity for the exhaustion of state remedies. His petition was, therefore, properly dismissed.

In *Buchanan v. O'Brien* (1st Cir. 1950), 181 Fed. (2d) 601, the Court had before it a similar problem dealing with the procedural requirements of the law of Massachusetts. The District Court had dismissed the petition without a hearing or the issuance of an order to show cause. The petition on its face showed the denial of a constitutional right. The Court affirmed the dismissal on the ground that the petitioner had not exhausted his state remedies as required by 28 U.S.C. 2254. The proper procedure in Massachusetts to collaterally attack a judgment of conviction seemed to be a writ of error. The petitioner had attempted habeas corpus but was unsuccessful. The petitioner then sought the writ of error.

In accord with Massachusetts procedure the matter was examined by a single justice of the highest Court. This justice denied the writ apparently on the ground that there was no merit in the claim. In order to get a hearing on the matter by the entire bench it was necessary under Massachusetts law to comply with certain procedures among which was the giving of notice to the Attorney General of the filing of exceptions to the order of the single justice. The petitioner failed to comply with this procedural rule and the full bench was prevented from reaching the merits of his claim. The Court held that he had not exhausted his State remedies. In this case, as in the case at bar, failure to comply with the procedural requirements prevented the State Courts from giving an adjudication of the claim and hence the State remedies were not exhausted.

The Court of Appeals for the 8th Circuit had a similar problem dealing with the procedural requirements of Minnesota in *Willis v. Utecht* (8th Cir. 1950), 185 Fed. (2d) 210. The State Court was prevented from reaching the merits of the habeas corpus petition because of non-payment of filing fees by the petitioner and the Court of Appeals held that the appellant had not exhausted his State remedies.

The Federal Courts have had the same problem when dealing with the procedural law of Pennsylvania. In *U. S. ex rel. Calvin v. Cloudy* (D.C., Penn., 1951), 95 Fed. Supp. 732, the petitioner prior to his application in the Federal District Court had peti-

tioned the Supreme Court of Pennsylvania for habeas corpus. The petition was denied and the United States Supreme Court denied certiorari. The Federal Court held that the petitioner had not exhausted his State remedies since under Pennsylvania law the Supreme Court only considered applications for habeas corpus in unusual circumstances, the normal rule being that the application should be made to the lower Superior Courts of Pennsylvania and the proceeding should come to the Supreme Court on appeal. Since the petitioner had not complied with the normal procedural requirements, the Pennsylvania Supreme Court had not denied him relief and hence he had not exhausted his State remedies. Accord *U. S. ex rel. Frazier v. Commonwealth* (D.C., Penn., 1951), 97 Fed. Supp. 62.

The conclusion is inescapable that Woollomes has not properly sought to invoke the corrective process provided by the State of California and until he has done so the Federal Courts should not entertain his application for habeas corpus.

B. The appellant is required to submit a petition to the California Supreme Court which will comply with its procedural requirements because federal courts cannot speculate on what the California Court will do with a properly presented petition.

It may be argued by the appellant that there is no time limitation on the right of a prisoner, confined in violation of his constitutional rights, to seek federal habeas corpus. He may argue that the State of California by imposing such a time limitation does not allow a prisoner to present his constitutional claim

and thus affords no corrective process. But the simple answer to this argument is that the Federal Courts cannot indulge in the presumption that the Courts of California will ignore the constitutional rights of inmates in State penitentiaries. As a matter of fact the presumption is very strong the other way.

An indication of the length to which the presumption that constitutional guarantees will be observed in State Courts is carried lies in the United States Supreme Court's decision in *Woods v. Nierstheimer* (1945), 328 U.S. 211. The case dealt with the post-conviction corrective process of the State of Illinois.

The case was in the Supreme Court of the United States on certiorari to the Supreme Court of Illinois which had denied the petitioner's application for habeas corpus. At that time it seemed that the proper method to collaterally attack a judgment of conviction in Illinois was by writ of error *coram nobis.* There was a 5-year statutory limitation on such action. Woods alleged that this period had expired and that he could not secure relief by *coram nobis.* Yet in the face of the seemingly inexorable statutory bar the Supreme Court said:

> "But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of constitutional guarantees where his action is brought more then five years after rendition of the judgment."

Relying on the reasoning of the *Woods* case the Court of Appeal for the Ninth Circuit in *Burton v.*

Smith (9th Cir. 1947), 162 Fed. (2d) 330, 333, refused to speculate on the potential inavailability of state corrective process. It was argued in that case that Washington did not provide adequate corrective process—that habeas corpus and *coram nobis* would not lie. The Court answered the argument thus:

> "It is not within the province of a federal court to predict what the holding of the state supreme court will be when 'the point is in actual controversy.' The mandate of the Supreme Court of the United States is that the *petitioner* by actual *attempt*—and not the federal court, by prognostication or ratiocination—shall exhaust all state remedies before applying to a federal tribunal for relief."

In *Hampton v. Smith* (9th Cir. 1947), 162 Fed. (2d) 334, 335, this circuit again discussed the apparent inavailability of post conviction corrective process in the State of Washington.

> "To make a showing of having exhausted state remedies, it is not sufficient for the seeker of federal relief to present a plausible argument that the state courts would probably not decide in his favor anyway. He must make an actual attempt to obtain redress in the state courts, and must prosecute that attempt in good faith."

In *Mason v. Smith* (9th Cir. 1947), 162 Fed. (2d) 336, 337, the Court affirmed the dismissal of a petition for habeas corpus on the ground that the State remedies had not been exhausted. The petitioner had sought *coram nobis* in the King County trial Court of the State of Washington. The petitioner did not re-

ceive notice of the denial of this writ until 13 days after the order. Under the rules on appeal for the Supreme Court of Washington a notice of appeal has to be filed within five days. Since that period had expired the petitioner again petitioned the lower Washington Court for *coram nobis*. The petition was denied on the basis that the first petition was *res judicata*. The Supreme Court of Washington affirmed. When the petitioner sought relief in the Federal Courts the Court held he had not exhausted his State remedies.

> "It will be observed that the appellant herein did not take an appeal from the adverse decision of the Superior Court of King County on his first petition for a writ of error coram nobis.
>
> "The fact that it was 'impossible for him to have served an [to] file a notice of appeal within five days as required by the rules governing appeals to the Supreme Court of Washington', does not excuse his non-action in the matter. He should have made the effort, and he must still make the effort, before he can successfully contend that he has exhausted all state remedies."

It is apparent from these cases that we are in no way concerned with the validity of any time limitation which may or may not be imposed by the California Court on the presentation of a constitutional claim. We do not know what the California Courts may or may not consider to be an adequate explanation for delay. But we do know that we cannot presume that California will ignore Woollomes' constitutional rights. He must properly present a petition and give the California Supreme Court a chance to

rule on the merits. *Achtien v. Dowd* (7th Cir. 1941), 117 Fed. (2d) 989. See: *Ex parte Elmer Davis* (1942), 318 U.S. 412.

C. Even if the California Supreme Court had reached the merits and denied the appellant's petition for habeas corpus on the ground that too much time has elapsed, the appellant would have still not exhausted his state remedies since he had a remedy at one time under the law of California and failed to avail himself of it.

It is our position that the validity of California's time limitation is not in issue in this case. As pointed out above, the California Court could not have reached the merits in view of the procedural inadequacy of Woollomes' petition. But assuming, for the purposes of argument, that the denial by the California Supreme Court of Woollomes' petition for habeas corpus was a ruling on the merits, namely, that too much time has elapsed with the appellant failing to seek the remedy provided by the State of California, it is our position that Woollomes has still not exhausted his State remedies.

Assuming that the California Supreme Court reached the merits, this is the case. Woollomes was convicted and imprisoned in violation of his constitutional rights.* California recognizes the constitutional right which was denied to Woollomes and will allow him to collaterally attack his conviction by habeas corpus (*In re Mooney,* 10 Cal. (2d) 1, 73 Pac.

*Any discussion over the question of exhaustion of state remedies of course always involves the presupposition that the judgment of conviction was obtained in violation of the petitioner's constitutional rights. That assumption is also implicit in this argument.

(2d) 554). Woollomes could have attacked his conviction but California imposes a time limitation and this time limitation has expired. Since Woollomes failed to avail himself of the corrective process available in the State of California he failed to exhaust his State remedy. The only question then will be whether there is any valid excuse for Woollomes' failure to avail himself of California corrective process—that is, whether there are any "exceptional circumstances" which will justify the Federal Court in entertaining the petition even though he has not "exhausted his State remedy".

Whether or not this proposition is correct depends on the determination of what precisely is meant by "exhaustion" of State remedies. If it means the "exhaustion" of only those remedies which are *now* available under the law of the State then the proposition is incorrect since because of the California time limitation Woollomes cannot now present his claim. But if it means, as we contend, the "exhaustion" of all those remedies which were ever available even though they may now be unavailable due to statutory or judicial limitation, then the proposition is correct and Woollomes by allowing his claim to grown stale has failed to exhaust his State remedy.

To illustrate our position assume that a person is convicted in a State Court in violation of his constitutional rights and with full knowledge of all the facts fails to take an appeal. Subsequently the State Courts refuse to grant him collateral relief on the ground that he should have appealed and there is no

justifiable excuse for not appealing. The United States Supreme Court denies certiorari. Has he exhausted his State remedy? We claim he has not and that the only federal question will be whether there are any exceptional circumstances which will excuse his failure to avail himself of State corrective process.

There seems to be no direct authority on this question. It has been discussed in several law review articles. 61 Harvard Law Rev. 657; 34 Minn. Law Rev. 653. *Sunal v. Large* (1947), 332 U.S. 174 holding that a federal prisoner may not raise in habeas corpus questions which could have been raised on appeal seems to support our theory. *Ex parte Hawk* (1943), 321 U.S. 114, 116, 117, codified in 28 U.S.C. 2254 seems to indicate that exhaustion of State remedies means not only those remedies presently available to the petitioner but also all those which were ever available.

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after *all state remedies available, including all appellate remedies in the state courts and in this court by appeal* or writ of certiorari have been exhausted." (Emphasis ours.)

The only square expression on the question by the Supreme Cout of the United States appears in the dissent of Mr. Justice Reed in *Wade v. Mayo* (1947), 334 U.S. 672, 693-6. Although the issue was sidestepped by the majority Mr. Justice Reed takes the position unequivocably that when it is shown that a petitioner

failed to exhaust his State remedies without adequate excuse, even though such remedies may now be unavailable, a Federal Court should not intervene to correct error. He points out that fundamentally this is a question of waiver and cites examples of cases in which the right to assert constitutional questions has been waived. He also points out that there is no danger of injustice that will stem from such a doctrine since if there is some valid justification for the failure of the petitioner to avail himself of the State remedy that will be an "exceptional circumstance" and the Federal Courts can entertain the petition even though the State remedies were not exhausted.

The 9th Circuit seems to be in accord with the view of Mr. Justice Reed. In *Barton v. Smith* (9th Cir. 1947), 162 Fed. (2d) 330, 333, it was argued that the State time limit had elapsed and that the petitioner was thus barred from collaterally attacking his conviction in the State of Washington. The Court said:

> "It is putting a premium on neglect and inaction to permit a prisoner to sit idly by and lose his state remedies through lapse of time, and then apply for habeas corpus in a federal court. An inmate of a state prison can thus force jurisdiction on a federal court, by the simple expedient of sleeping on his right to seek the aid of the state Forum."

Applying these decisions to the case at bar it appears that if Woollomes failed to avail himself of the available State corrective process and is now

barred by the lapse of time, he did not exhaust his State remedy. If there are "exceptional circumstances" which would justify this failure they should have been set forth in the petition. Since no "exceptional circumstances" are alleged the inescapable conclusion is that Judge Carter correctly dismissed the petition.

II. IN ANY EVENT THE FEDERAL DISTRICT COURT PROPERLY DENIED THE PETITION BECAUSE THE PETITION DID NOT ALLEGE FACTS WHICH, IF TRUE, WOULD SHOW THAT THE APPELLANT HAD BEEN DENIED ANY RIGHT UNDER THE UNITED STATES CONSTITUTION.

If the petition does not allege facts which show the denial of a constitutional right it should be dismissed. *Walker v. Johnson* (1941), 312 U.S. 275.

Woollomes alleges that prior to the trial his attorney and his friends made every effort to locate witnesses to the crime. The police officials would not give out the names. Woollomes' friends were allowed to inspect the records in both the Police Department and the Coroner's office but they found only the names of those witnesses who had testified at the preliminary examination. But after the trial these friends again inspected the records and found a list of other witnesses who had not been called by the prosecution. These witnesses were interrogated and executed affidavits to the effect that Woollomes had not committed the crimes. The jurors then by affidavit stated that if this testimony had been presented they would have voted for an acquittal.

These are the facts which Woollomes alleges constitute a denial of due process of law. He relies on *Mooney v. Holohan* (1935), 294 U.S. 103, and *Pyle v. Kansas* (1942), 317 U.S. 213. In both these cases the petitioner alleged that the sole basis of his conviction in the State Courts was perjured testimony which was knowingly used by the prosecuting authorities and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. Such action by the prosecution is a deprivation of the constitutional requirement of due process. In *Mooney v. Holohan, supra,* the Court expressed the gist of the constitutional deprivation thus:

> "[Due process of law] cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through a pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

The Court concludes:

> "A contrivance by the state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (P. 112.)

It is apparent that the essence of the deprivation is the "contrivance", by the State. Accordingly it is well settled that the fact that there may have been perjury or that new evidence may have been dis-

covered which would establish the prisoner's innocence is not sufficient unless there was active fraud by the prosecutor.

Tilghman v. Hunter (10th Cir. 1948), 167 Fed. (2d) 661;

Cobb v. Hunter (10th Cir. 1948), 167 Fed. (2d) 888;

Wild v. Oklahoma (10th Cir. 1951), 187 Fed. (2d) 409;

Kelly v. Ragen (7th Cir. 1942), 129 Fed. (2d) 811;

Hodge v. Huff (D.C. 1944), 140 Fed. (2d) 686.

In the light of these decisions consider the facts alleged in Woollomes' petition.

First, does the petition allege facts from which it could be inferred that the prosecution *knew* of this adverse evidence? The petition alleges that the prosecution refused to divulge the names of witnesses. The inference is that since a list of witnesses appeared in the records of the coroner's office after the trial the prosecution knew of these witnesses at the time of the trial. As far as it goes this may be a valid inference. But a reading of the affidavits themselves shows that the prosecution had no knowledge of the nature of the testimony that would be given by these witnesses. Of the seven witnesses, five were never even contacted by the prosecution. The prosecution could have had no knowledge of the unfavorable nature of the testimony of these witnesses. As to these witnesses the first necessary element is therefore manifestly lack-

ing—knowledge by the prosecuting authorities of the unfavorable nature of the testimony.

Secondly, does the petition allege facts from which it can be inferred that the prosecuting authorities *suppressed* this testimony? Two of the witnesses allege in their affidavits that they were interrogated by the police and that they were not able to identify Woollomes as a participant in the crime. These witnesses were not called by the prosecution and the prosecution did not give their names to the defense. Is this *suppression?* We submit that it is not. Suppression implies fraudulent concealment and intimidation. The prosecution in no way attempted to conceal the evidence. There was no attempt to mislead the defense. The prosecution apparently was quite frank with the defense and told them that it was not their policy to disclose the names of witnesses. If the defense had difficulty locating witnesses they could have easily secured a continuance for that purpose. Two of the witnesses whose names were allegedly withheld by the prosecution were members of the band which had been playing at the cafe on the night of the robbery. It should have been relatively simple to discover their names without any help from the police. The due process clause nullifies convictions secured through fraudulent deception practiced by the prosecuting authorities. That is the holding of the *Mooney* and *Pyle* cases. But the due process clause can not be used to nullify a conviction when the prosecution had all its cards on the table and where the sole basis for the collateral attack is, in reality, nothing more than newly discovered evidence.

It should be noted that the defense moved for a new trial on the ground of newly discovered evidence. That newly discovered evidence was substantially the same as that which is made the basis of the present collateral attack. The trial judge considered the evidence and denied the motion. The denial was affirmed by the California Supreme Court. *People v. Lariscy,* 14 Cal. (2d) 30, 33.

"Perjured testimony knowingly used" and "knowing suppression of unfavorable testimony" are not words of art which automatically entitle a petitioner in habeas corpus to a hearing on the merits. They are conclusionary allegations and must be supported by facts. Woollomes' petition clearly does not make out such a case and was, therefore, properly dismissed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the dismissal of the petition by the Federal District Court should be affirmed.

Dated, San Francisco, California,
May 23, 1952.

EDMUND G. BROWN,
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No. 13229

United States
Court of Appeals
for the Ninth Circuit

MICHAEL KULUKUNDIS,

Appellant,

vs.

OLAF N. STRAND,

Appellee.

Apostles on Appeal

Appeal from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Reporter's Transcript.

In the District Court of the United States
for the District of Oregon

In Admiralty—Civil No. 5850

OLAF N. STRAND,

Libelant,

S.S. STATHES J. YANNAGHAS, her engines, boilers, tackle, apparel and furniture,

Respondent.

MICHAEL KULUKUNDIS,

Claimant.

AMENDED LIBEL IN REM

To the Honorable Judges of the above entitled Court:

Petitioner, Olaf N. Strand, having obtained leave of Court to amend the Libel In Rem on file herein against the S.S. Stathes J. Yannaghas, respondent, now amends his petition and respectfully represents as follows:

Article I.

During all times herein mentioned the S.S. Stathes J. Yannaghas was and now is an ocean-going vessel engaged in off-shore trade and in foreign commerce, operating under registration of the Republic of Panama; that on or about the 12th day of December, 1950, said S.S. Stathes J. Yannaghas was moored at a dock known as the Clark Wilson Dock in the City of Portland, County of Multnomah, State of Oregon, and lying in navigatable waters of the United States; that said vessel was

and now is within the District of Oregon and within the jurisdiction of this Honorable Court.

Article II.

That at the time and place as aforesaid the libelant was employed by W. J. Jones & Son, Inc., as a stevedore and was engaged on the S.S. Stathes J. Yannaghas as a part of the longshore crew engaged in lining the holds of the vessel with timbers preparatory to taking on a wheat cargo; that at the time said libelant received the injuries complained of, as hereinafter alleged, said libelant was assisting in lining Hold No. 4 of said vessel; that in order to line said hold the libelant and the other members of the longshore crew were required to cover the 'tween deck hatches of No. 4 Hold with the hatch covers contained in said ship in order to provide support for the libelant and others for the performance of their duties and libelant was required to and did stand upon said hatch covers positioned between the strong back or cross-beam structures of said ship provided for the support of said hatch covers; that said strong backs or cross-beams were warped and out of line to such a degree that some of the hatch covers and particularly the hatch cover upon which the libelant was standing slid off its supporting strong backs or cross-beams and precipitated the libelant into the bottom of the hold, a distance of approximately 25 feet; that by reason thereof the libelant sustained serious, painful and permanent injuries as hereinafter more specifically alleged.

Article III.

That at the time and place aforementioned it was the duty of said respondent, the master of said vessel, its owners, operators and managers to provide the libelant with a safe and seaworthy condition; to promulgate and enforce proper and safe rules for the safe conduct of stevedore work on the vessel; to provide a safe place in which to work and to warn libelant of any danger arising, and to be encountered therein; that by reason of the unseaworthy condition of said vessel and the negligent failure of the respondent, the master, owners, operators, servants and employees, and each of them, to perform the foregoing duties, the libelant, at the time and place aforesaid, in pursuance of his duties as a stevedore on board said S.S. Stathes J. Yannaghans and while exercising due care and caution, sustained serious, painful and permanent injuries as hereinafter more specifically alleged; that the vessel was unseaworthy and the respondent, its master, owners, operators, servants and employees were careless and negligent in the following particulars:

(a) In providing supporting beams which would not support the hatch covers and prevent them from dislodgement;

(b) In providing defective and worn hatch covers which condition was known, or by the exercise of reasonable care should have been known by respondent;

(c) In failing and neglecting to equip said vessel with hatch covers constructed to fit the hatches to be used by Libelant;

(d) In failing and neglecting to inform Libelant of the warped and defective condition of the cross-beams and of the requirement of using hatch covers suitable for said warped cross-beams.

(e) In failing and neglecting to provide said hatch covers with numbers to indicate the proper hatch for each location on the defective and warped cross-beams;

(f) In not furnishing the libelant a safe and seaworthy place in which to work.

Article IV.

That as the proximate result of the unseaworthiness of said vessel and the negligence aforesaid, Libelant became sick and disabled, in that his face was bruised and contused, the interior of his mouth was torn and lacerated, a portion of libelant's lower lip was almost torn off, resulting in severe scarring; his back muscles and nerves were sprained, resulting in severe low back pain and he has suffered and will continue to suffer severe pain for a long time to come; that the aforesaid injuries were due wholly to the negligent and improper manner in which the respondent and those working under its direction and control maintained the hatch covers and strong backs or cross-beams in said vessel. That by reason of the injuries as aforesaid Libelant has been con-

fined to a hospital; has been and will be prevented from working; has lost and will continue to lose large sums of money which he would otherwise have earned; has paid out and will have to pay out large sums of money for medical and surgical attendance and for maintenance and cure and he is further informed and believes that he will be permanently disfigured and disabled, all to his damage in the sum of $25,000.00.

Article V.

That immediately prior to his receiving the aforesaid injuries, libelant was a strong, healthy and able-bodied man of the age of 63 years, with a life expectancy of 12.69 years based on Commissioners Standard Ordinary morality table, and earning approximately $400.00 per month. That as the proximate result of the negligence of respondent, the master, owners, servants and employees as aforesaid, Libelant is informed and believes that he will be unable to work for an indefinite period of time in the future on account of said injuries and will be deprived of his wages by reason thereof and prays leave to amend and insert herein the amount of wages he will have lost thereby when the same has been ascertained or to offer proof at the time of trial.

Article VI.

That libelant has been disabled in the services of the ship and rendered unable to work as the proximate result of said injuries and because thereof is

entitled to and claims maintenance money in the sum of $7.00 per day from December 12, 1950, until such time as he recovers from said injuries sufficiently to work.

Article VII.

That all and singular the premises are true and that it is a cause civil and Maritime and within the Admiralty and maritime jurisdiction of this Honorable Court that the S.S. Stathes J. Yannaghas is within the District of Oregon. That Libelant is a citizen of the United States and that he was employed at Portland, Oregon; that his address is 4834 N.E. 26th Avenue, Portland, Oregon.

Wherefore, Libelant prays that a warrant of arrest in due form of law, according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may be used against the respondent, S.S. Stathes J. Yannaghas, her engines, boilers, tackle, apparel and furniture, and that all persons having or pertaining to have any right, title or interest therein may be cited to appear and to answer all and singular the matters hereinabove set forth and that the Court may be pleased to decree Libelant his damages with costs, and that said steamship S.S. Stathes J. Yannaghas, her engines, boilers, tackle, apparel and furniture may be condemned and sold to pay the same and that it be required to answer on oath this Libelant in the matters therein contained and that it be decreed to pay the libelant the sum of $25,000.00 damages, plus future maintenance, costs and such other and

further relief as in law and justice he may be entitled to receive.

Dated March 1st, 1951.

GOODMAN & LEVENSON,
LEO LEVENSON,
/s/ SAMUEL JACOBSON,
of Proctors for Libelant.

Duly verified.
Acknowledgment of Service attached.

[Endorsed]: Filed March 1, 1951.

[Title of District Court and Cause.]

CLAIM OF OWNER

Comes now S. Yannaghas, master of the Steamship Stathes J. Yannaghas, and says that Michael Kulukundis is the true and lawful owner of said vessel and that he, S. Yannaghas, is the master and bailee of said vessel and is entitled to the possession of the vessel, and therefore hereby makes claim to the vessel and prays leave to defend against the libel herein.

/s/ S. YANNAGHAS,
Master.

Subscribed and sworn to before me this 15th day of December, 1950.

[Seal] /s/ MARY ANN BISHOP,
Notary Public for Oregon.

My Commission expires 8/23/54. [2]

[Endorsed]: Filed Dec. 20, 1950.

[Title of District Court and Cause.]

ANSWER OF CLAIMANT TO AMENDED LIBEL

To the Honorable Judges of the above entitled Court:

The answer of the above named claimant to the amended libel respectfully says as follows:

Article I.

Claimant admits the allegations of Article I, except that the vessel is now within the District, but admits that it was within the district when the original libel was filed.

Article II.

Claimant admits that libelant was employed by W. J. Jones & Son, Inc., and was engaged in lining the holds of the vessel preparatory to taking on a wheat cargo, and that he was assisting in lining Hold No. 4, but denies the remaining allegations of Article II.

Article III.

Claimant denies the allegations of Article III.

Article IV.

Claimant denies the allegations of Article IV.

Article V.

Answering Article V, claimant denies knowledge or information [3] sufficient to form a belief as to the health or life expectancy or earnings of libelant. The remaining allegations of Article V claimant denies.

Article VI.

Claimant denies the allegations of Article VI.

Article VII.

Claimant denies that all or singular the premises are true, but admits the jurisdiction of the court and admits libelant's citizenship and address.

Further Separate Answer and Defenses

For a further, separate answer and defense, claimant alleges that libelant voluntarily and knowingly stepped upon a hatchboard which was obviously not then in its proper place, or fitted on the supporting flanges, which libelant knew or should have known, and that while so standing on said hatch-board he was attempting to pry another hatchboard into place, and in so doing caused the board on which he was standing to slip and fall into the hold, and that he fell with it, and that he was not ordered to do this by the claimant or by any of claimant's agents, nor in fact by anybody, and that he was injured by his own sole negligence in acting as above alleged; or if the Court should find that it was not his sole negligence, and that any negligence of claimant contributed to the injury, then libelant's conduct as above described likewise contributed to his injury.

For a second and further answer and defense, claimant realleges the facts alleged in its first answer and defense above, and says that libelant assumed the risk of standing on said hatch-board and attempting to pry the other one in place as alleged.

Wherefore, claimant prays that the amended libel

be dismissed, and that claimant may recover its costs and disbursements, and for such other, further and different relief as to the Court may seem just and in accordance with the admiralty practice.

WOOD, MATTHIESEN & WOOD,
/s/ ERSKINE WOOD,
Proctors for Claimant.

Duly verified.

Acknowledgment of Service attached.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial before the above entitled Court on the 15th day of June, 1951, the libelant appearing in person and by his proctors, Leo Levenson and Samuel Jacobson, the respondent and claimant appearing by Erskine Wood, Proctor, and the Court having heard the testimony of the witnesses and the arguments of counsel, and having taken said cause under advisement and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

I.

On December 12th, 1950, libelant was an invitee on the respondent ocean-going ship and at the time

of the injury he was engaged in stevedore work as a liner, on the 'tween deck of hold No. 4 thereof.

II.

In performance of his duties, libelant was standing upon a hatch cover positioned between a pair of strong backs or cross-beam structures of hold No. 4 of said respondent ship and said strong-backs or cross-beams were dangerously defective and in a hazardous condition in that they were warped and out of line to such a degree that the hatch cover upon which the libelant was required to stand, without his fault, became displaced and violently precipitated the libelant to the bottom of the hold thereof. [4]

III.

The owners of the respondent were negligent and careless in failing to provide a safe and seaworthy place for the libelant to carry on his work and in failing to provide strong-backs and supporting beams which would support hatch covers and prevent their dislodgement, and the condition of the strong-backs at the time of the injury made the ship unseaworthy, which was known or should have been known by the owners of the respondent.

IV.

As a proximate result of the unseaworthiness of the ship and the negligence of the owners of the respondent, the libelant sustained injuries to his face, the interior of his mouth, a torn and lacerated lower lip resulting in a permanent scar thereon, an

injury to his back and bruises and contusions to his body. The aforesaid injuries and resulting pain and suffering were not due to any aggravation of any pre-existing condition, and, in addition, the back injury sustained by libelant resulted in an exacerbation of a pre-existing arthritic condition.

V.

Libelant's disability and suffering from the bruises and contusions, and injuries to his mouth and lip have terminated, except that a permanent scar exists on the lower lip, but the exacerbation of the arthritic condition has not terminated and is of a continuing and permanent nature, which exacerbation and resulting pain and suffering is not due wholly or in any part to any intervening or unrelated condition not connected with the aforesaid accident.

VI.

The libelant has suffered and will continue to suffer pain and has been and will be disabled from work of the type previously performed by him and he has suffered and will suffer loss from the impairment of his ability to work and from expenditures necessarily incurred and which will be incurred for medical treatment, hospitalization and medicines.

VII.

The libelant's earning capacity at the time he was injured was $4,200.00 to $4,800.00 per year.

VIII.

Libelant was not guilty of negligence contribut-

ing to the accident and the injuries sustained by him as a result thereof.

IX.

In the performance of his duties the libelant did not assume the risk of the injuries sustained by him incident to his employment as a stevedore.

X.

As a result of the injuries sustained by libelant as a proximate result of the unseaworthiness of the vessel and the negligence of the owners of respondent, the libelant was damaged in the amount of $10,000.

Based upon the Foregoing Findings of Fact, the Court hereby makes and finds the following:

CONCLUSIONS OF LAW

I.

It was the duty of respondent to furnish the libelant a safe place to work and to keep and maintain the strong-backs and hatch covers on the vessel reasonably safe from defects and in a safe and seaworthy condition.

II.

The defects in the strong-backs were such as to make the ship unseaworthy.

III.

The owners of respondent were negligent and failed in their duty to the libelant and the injuries suffered by him were due solely to the negligence

of said owners of respondent and the unseaworthy condition of the respondent ship.

III.

The libelant has a right to recover for the injuries sustained by him by reason of the negligence of the owners and the unseaworthy condition of respondent ship.

IV.

The libelant is entitled to a judgment against respondent as fair compensation by way of damages in the sum of $10,000.

Dated this 3rd day of October, 1951.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed October 3, 1951.

In the District Court of the United States
for the District of Oregon

In Admiralty—Civil No. 5850

OLAF N. STRAND,

Libelant,

vs.

S.S. STATHES J. YANNAGHAS, her engines, boilers, tackle, apparel and furniture,

Respondent.

MICHAEL KULUKUNDIS,

Claimant.

FINAL DECREE

This cause having come on regularly for trial before the above entitled Court on the 15th day of June, 1951, the libelant appearing in person and by his proctors, Leo Levenson and Samuel Jacobson, the respondent and claimant appearing by Erskine Wood, Proctor, and the Court having heard the testimony of the witnesses and the arguments of counsel, and having taken the matter under advisement and being fully advised and having on the 3rd day of October 1951, made and filed findings of fact and conclusions of law wherein the Court found that libelant is entitled to a decree against the respondent in the sum of Ten Thousand and no/100 ($10,000.00) Dollars general damages; and

It appearing to the Court from the files herein that a claim for said steamship has been filed by Michael Kulukundis and that said claimant and National Surety Corporation, his surety, have ex-

ecuted and filed herein their stipulation consenting and agreeing to abide by and pay to the libelant, Olaf N. Strand, such sums as may be awarded to him by the final decree entered herein and that in case of default and contumacy on the part of the claimant, execution may issue against their goods, chattels and land for the sum of Ten Thousand ($10,000.00) Dollars. [5]

Now, therefore, upon motion of the Proctors for Libelant:

It is Ordered, Adjudged and Decreed by the Court that the Libelant, Olaf N. Strand, do have and recover of and from the claimant, Michael Kulukundis, and of and from his surety, National Surety Corporation, the sum of Ten Thousand ($10,000.00) Dollars; and also that Libelant have and recover from the claimant and of and from said surety, his costs and disbursements incurred herein taxed at $..... for all of which sums execution may issue as authorized by law; and

It is further Ordered, Adjudged and Decreed that the Clerk of the Court pay to the Libelant, Olaf N. Strand, out of the registry of this Court the sum of Two Hundred ($200.00) Dollars deposited by him to secure costs and disbursements, less $.... Clerk's deductions and fees.

Dated this 20th day of October, 1951.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed October 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Olaf N. Strand and Goodman & Levenson and Samuel Jacobson, his proctors:

Notice is hereby given that claimant, Michael Kulukundis, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree, and the whole thereof, entered in this cause on October 20, 1951, by which decree Olaf N. Strand was awarded $10,000.00 and costs against this claimant Michael Kulukundis.

Dated: December 26, 1951.

/s/ ERSKINE WOOD,
/s/ WOOD, MATTHIESSEN & WOOD,
Proctors for claimant.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 28, 1951. [6]

[Title of District Court and Cause.]

PETITION FOR APPEAL

The claimant Michael Kulukundis, being aggrieved by the final decree entered in this cause on October 20, 1951, prays that he may be allowed to appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit.

MICHAEL KULUKUNDIS,
/s/ By ERSKINE WOOD,
His Proctor.

It Is Hereby Ordered that the foregoing petition for appeal be, and the same is, hereby allowed.

Dated: December 28th, 1951.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Acknowledgment of Service attached.
[Endorsed]: Filed Dec. 28, 1951. [7]

[Title of District Court and Cause.]

CITATION ON APPEAL

To: Olaf N. Strand, and Goodman & Levenson and Samuel Jacobson, his proctors:

Whereas, claimant Michael Kulukundis has lately appealed to the United States Court of Appeals for the Ninth Circuit from the final decree rendered in the above entitled cause on October 20, 1951, awarding damages to libelant Olaf N. Strand and has given the security required by law;

You Are Therefore Hereby Cited and Admonished to be and appear before said United States Court of Appeals for the Ninth Circuit, at San Francisco, California, within forty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice done to the parties in that behalf.

Given under my hand at Portland, in said District, this 28th day of December, 1951.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.
[Endorsed]: Filed Dec. 28, 1951. [8]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The claimant, Michael Kulukundis, appealing from the final decree entered in this court and cause on October 20, 1951, makes the following assignment of error:

I.

The trial court erred in finding negligence against the respondent and that it was a proximate cause of libelant's injuries, and in awarding damages in favor of libelant.

II.

The trial court erred in finding that the steamship Stathes J. Yannaghas was unseaworthy in respect to the hatch beams and hatch covers where libelant was working, or otherwise, and that such unseaworthiness was the proximate cause of libelant's injuries.

III.

The trial court erred in decreeing that libelant Strand have and recover from claimant Kulukundis and his surety the sum of $10,000 and costs.

IV.

The trial court erred in finding that libelant Olaf N. Strand did not assume the risk of the job in which he was engaged, to-wit: covering up a hatch under the conditions as disclosed by the evidence. [9]

V.

If the respondent was guilty of negligence, which

claimant denies, the trial court erred in finding that Olaf N. Strand was not guilty of contributory negligence contributing to his injuries, and in not dividing the damages accordingly.

/s/ ERSKINE WOOD,
Of Proctors for claimant and appellant Michael Kulukundis.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 28, 1951.

[Title of District Court and Cause.]

BOND ON APPEAL STAYING EXECUTION

Know All Men By These Presents, that we the undersigned, Michael Kulukundis and National Surety Corporation, authorized to transact surety business in the State of Oregon, are held and firmly bound unto Olaf N. Strand, libelant, in the sum of Fifteen Hundred Dollars, to be paid to said Olaf N. Strand, his successors or assigns for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally firmly by these presents. Sealed with our seals and dated the 26th day of December, 1951.

Whereas, Michael Kulukundis, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the District Court

of the United States for the District of Oregon of October 20, 1951, in a suit in which said Olaf N. Strand is libelant, The S.S. Stathes J. Yannaghas is respondent and Michael Kulukundis is claimant and said Michael Kulukundis desires that during such an appeal execution of said decree be stayed;

Now, Therefore, the condition of this obligation is such that if said Michael Kulukundis shall prosecute said appeal with effect and pay all costs which may be awarded against him as such appellant if the appeal is not sustained, and if he shall abide by and perform whatever [10] decree may be rendered by said Court of Appeals or on the mandate of the court by the court below, then this obligation shall be void, otherwise to remain in full force and effect.

MICHAEL KULUKUNDIS,
/s/ By ERSKINE WOOD,
Proctor.

[Seal] NATIONAL SURETY CORPORATION,

/s/ By W. B. GILLIAN,
Attorney-in-Fact.

The said bond is approved and execution of the decree is stayed.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 28, 1951.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of amended libel, claim of owner, answer of claimant, findings of fact and conclusions of law, final decree, notice of appeal, petition for appeal, citation on appeal, assignments of error, bond on appeal, order for clerk to send exhibits, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a decree of said court in a cause therein numbered Civil 5850, in which Olaf N. Strand is libelant and appellee, and Michael Kulukundis is claimant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate of transcript of proceedings dated June 15, June 19, and October 1, 1951, filed in this office in this cause, together with exhibits Nos. 1 to 14 inclusive.

I further certify that the cost of preparing the transcript and filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of January, 1952.

[Seal] LOWELL MUNDORFF,
Clerk.
/s/ By F. L. BUCK,
Chief Deputy. [13]

In the United States District Court
for the District of Oregon

In Admiralty—Civil No. 5850

OLAF N. STRAND,

Libelant,

vs.

S.S. STATHES J. YANNAGHAS, her engines, boilers, tackle, apparel and furniture,

Respondent.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Portland, Oregon, June 15, 1951

Before: Honorable Claude McColloch, Judge.

Appearances: Messrs. Leo Levenson and Samuel Jacobson, Proctors for Libelant; Mr. Erskine Wood (Wood, Matthiessen & Wood), of Proctors for Respondent. [1*]

The Court: Are you ready?

Mr. Jacobson: Yes, your Honor.

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Call your witnesses.

Mr. Jacobson: I'd like to make a statement, first, your Honor.

The Court: Not too long. I have read the pleadings.

(Thereupon, a brief opening statement was made by proctor for the libelant.)

Mr. Jacobson: Mr. McDonald, please.

NORMAN McDONALD,

called in behalf of the libelant, and, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jacobson): Where do you reside, Mr. McDonald? A. How?

Q. Where do you reside?

A. 1762 North Ross.

Q. What type of work do you follow, Mr. McDonald? A. Longshoring.

Q. How long have you been doing that type of work? A. Well, about 11 years.

Q. Now, did you do any work on a ship known as the Stathes J. Yannaghas, a Greek ship?

A. Yes, I was lining on there.

Q. Was that ship berthed at the Clark & Wilson Dock in Portland, [2] Oregon?

A. Clark & Wilson.

Q. Do you recall the date when you were working on that ship? A. No, I do not.

Q. Were you a member of a crew, longshore crew that was sent down to this ship for the purposes of lining it for the wheat cargo or a grain cargo?

(Testimony of Norman McDonald.)

A. Yes, I was.

Q. Do you recall whether or not a Mr. Olaf Strand was a member of that gang?

A. Yes, he was.

Q. Was this ship being lined for cargo about December, 1950, was it in December?

A. It was, yes, I believe it was. I just don't remember the date.

Q. Now, how many members were in that longshore crew?

A. Let's see, there was three winch drivers and at least seven men in the hold. I believe 10 or 11, let's see now, and a hatch boss, 11 men.

Q. Now when you and the other members of the crew went down to the ship what work were you doing there?

A. Well, the first thing we do is you uncover and cover the top deck so you can put lumber down in the lower holds, then your shelter deck you got to put hatch covers on when you get your lumber down, try to get your hatch covers on and leave one space [3] open so you get your lumber down in the lower holds.

Q. What hold did you and the other crew members work on when you first went down there?

A. When first went down worked in No. 3 hold.

Q. And that work was to build up a temporary bulkhead known as lining; is that correct?

A. That's right.

Q. What type of work were you doing down

(Testimony of Norman McDonald.)

there at that particular time? A. Lining.

Q. Was it on a 'tweendeck, or was it down in the hold or where? A. On No. 3?

Q. Yes.

A. That was down in the hold.

Q. Now did you and the other members of the longshore gang, did you complete the job on No. 3 hold?

A. No, they didn't know just how much feeder box, how much space they wanted for the feeder box, so they shifted us over to No. 4 in the afternoon.

Q. Did the whole gang then go over to hold No. 4? A. Yes.

Q. When you got to No. 4, what did you find at hold No. 4? Was it covered? Did they have the strongbacks in or what?

A. No, they didn't, put strongbacks in, and the hatch covers were back, in the shelter deck. They were back in the wing. [4]

Q. Did any of the members of the gang or the hold gang start putting some hatch covers down on top of the strongbacks in hold No. 4?

A. Yes, we did.

Q. Were you among them? A. Yes.

Q. Will you tell the Court what condition you found the strongbacks to be in at the time you were putting down some hatch covers?

A. Well, we tried to put them on, and they would not fit. The strongbacks, they were bent out of shape, and they would not fit. You would get one

(Testimony of Norman McDonald.)

into fit and the rest wouldn't, you couldn't get any more in, maybe get them half way in, something like that, just have to take them out, and we monkeyed around there for over half an hour or more, and all of us, I will say, the six or seven of us were in the hold, and so I told the walking boss, looked over the hatch a couple times, I told him, I said, "We can't do nothing here at all." "We can't get these hatch covers up," I said, "the beams are all sprung so bad that we can't get them on so," I says, "I am going to try to get it on, get down the lower hold to the lumber down there and see what we are going to do." And as they had one pretty near in, I guess, we went down in the lower hold, another fellow and I, and evidently Mr. Strand and Mr. Ramsby, they were working on one end, and it fell through. I looked up and see Mr. Strand come down just like that, just [5] up-ending, coming down through there.

Q. Well, coming back to the time you and the rest of the crew members or some of the gang were getting the hold in readiness to line that part of the ship, there were some hatch covers put down by some of the crew members before you went down into the hold; is that correct?

A. Yes, we all worked on them.

Q. And you found that some of them would not fit, and you just gave up and went down into the hold?

A. Yes, I went down into the hold, down in the lower hold.

(Testimony of Norman McDonald.)

Q. Down to the bottom of the ship, lower hold?

A. To land the lumber down there, to get the lumber down in the lower hold.

Q. All right now, the strongbacks, are they a part of the ship?

A. Oh, yes, they are part of the ship. The strongbacks, they go across the hatch, and then you put the hatch covers on, and the hatch cover is supposed to fit free and go in there easy. They go across the strongbacks.

Q. What type of ship was this?

A. Liberty.

Q. An American built ship? A. Yes.

Q. Do you know of your own knowledge as to whether or not the spaces between the strongbacks as they are put on the hold, are they uniformly even? [6]

A. Yes, they should be, yes.

Q. As you install them into the hold in their places where the, make them fit into and tie them down; is that correct? A. Tie them down?

Q. Well, I mean screw them in or fit them so that they will stay put?

A. No, they are supposed to stay. They are supposed to fit in there. There is a groove that they are to fit in there, and they are supposed to fit in there without anything to hold them in. You see what I mean. If everything is in shape, they are supposed to fit in there, and you are supposed to be able to slide them back and forth. That is the way we are doing our lining job, slide them back and forth, put

(Testimony of Norman McDonald.)

the uprights inside of the coaming, put uprights there and you have got to have the hatch covers far enough away so that we get them 4 by 6's in there. In other words, split the hatch covers up. We take about two out of each layer of a lining job, take about two out, and spread them apart, work on it that way.

Q. And the strongbacks themselves are evenly spaced in relation to the hold? A. Yes.

Q. They are fixed locations where the strongbacks are fitted in relation to the coaming?

A. Yes, there is a slot for them to go in each end. There is a slot. [7]

Q. And after those strongbacks are put in they are fitted on top with a flange, a T-shaped flange; is that correct, a fitted T-shape?

A. That is on them, yes, it is on them.

Q. It is on those, between those that the hatch covers are supposed to fit?

A. That's right, that's right.

Q. Now, in this particular hold did you see, yourself, as to whether or not those strongbacks were all in parallel lines and not out of line at all?

A. They were not. They were all out of shape. They were bent out of shape, and that's why we couldn't get the hatch covers on there the way we should have, and they wasn't right at all.

Q. Now getting back to each of the strongbacks, they each have a vertical fin or piece that is a part of the flange, is that correct?

A. Yes, right in the center.

(Testimony of Norman McDonald.)

Q. Yes? A. Yes, right in the center, yes.

Q. Now did you check and see whether or not those were in line as well as the strongbacks themselves?

A. Well, if a strongback is in shape, if it is not crooked and out of shape, the hatch covers go right there easy. As soon as you fit the hatch cover on you can tell. Sometimes if, it's a little bit tight. You have got to screw them in a little bit, [8] but this was all out of shape.

Q. What about the top part? Were some of those bent over?

A. They was bent, too. That flange, that flange was bent in several places, and it wouldn't go down.

Q. Well, what happened upon trying to put your hatch covers down on the flange of the—between the strongbacks?

A. Well, you couldn't, you can't get them down. You know, sometimes you can pry or pry a little bit. There is quite a few times that they are a little bit tight, you know, to go in. A beam might be sprung just a little bit, and you can get the stick in there and pry them, and they will go down if they are not sprung too much.

Q. Now if the strongbacks on a ship, whether it is a Liberty ship or not, are in proper alignment, is it a fact that the hatch covers will fit in without any effort whatever? A. Yes.

Q. Now in this particular hold, Mr. McDonald, you, yourself, found that you couldn't fit down some of the hatch covers; is that correct?

(Testimony of Norman McDonald.)

A. That's right.

Mr. Jacobson: I will have these marked for identification, please.

(Photographs marked Libelant's 1 through 6 inclusive for identification.)

Q. (By Mr. Jacobson): Will you hand these to the witness, please. [9] Mr. McDonald, you are being handed six photographs marked Libelant's Exhibits 1 to 6 for identification. Those are pictures of hold No. ——

Mr. Wood: May I see them, please?

Mr. Jacobson: Oh, I beg your pardon.

The Court: After this exchange your pictures before trial. Pre-trial practice should have taught everybody that by now.

Q. (By Mr. Jacobson): I show you six photographs of hold No. 4 and ask you if you recognize the hold from those photographs?

A. Yes, I do, because I—because after Mr. Strand fell we put all these false hatches in. They are called false hatches. The gate man put them in because the other hatches wouldn't fit.

Q. Are those photographs a fair representation of the hold as you saw it on the day of the accident?

A. Yes, they are.

Mr. Jacobson: Your Honor, we offer those photographs in evidence.

Mr. Wood: No objection.

The Court: They are admitted.

(Testimony of Norman McDonald.)

(Thereupon photographs previously marked Libelant's 1 through 6 inclusive were received in evidence as Libelant's Exhibits 1 through 6, inclusive.)

Q. (By Mr. Jacobson): Now, I believe you stated during your previous testimony that you saw Mr. Strand fall; is that correct?

A. Well, yes, I seen him when he was, just when he started I [10] just—somebody hollered, "Heads up," and just looked up right now. Of course, it doesn't take long to fall 25 feet, and when I seen him, he went over like that a couple times before he hit the shaft alley, and we on the other side, this other fellow and I jumped over across the shaft alley, went across, and he was laying there on his back.

Q. How far from the hold is the shaft alley?

A. I think the shaft alley is about eight feet. That is, the shaft alley is eight feet from the deck. I believe it's eight feet. I wouldn't say for sure.

Q. But you know he hit that alley first?

A. Hit that a glancing blow, yes.

Q. Then from there landed down in the bottom of the hold?

A. Landed down in the bottom of the hold.

Q. Do you recall what happened? Was there anything else that you saw fall?

A. A hatch cover.

Q. Do you recall whether or not that contacted him at all as he was falling?

(Testimony of Norman McDonald.)

A. Well, I couldn't say for sure. I don't believe it did hit him because everything like that happened so quick that it's pretty hard to say.

Q. Now when you came to him what condition did you find him in, when you came to him after he fell?

A. Well, he was unconscious, and his face here was all blood [11] and cut, and, of course, he was so bloody, it was hard to tell just what happened. I hollered for blankets. The first thing I thought of was blankets and to get a stretcher, and I went up, tried to get some blankets right away because a fellow gets a jar like that, he gets a jolt, he might get pneumonia right away, so the main thing is to try to cover him up with blankets if you can, and we got the stretcher down there.

Q. Did you help put him into the stretcher?

A. No, I didn't. I was on deck then. There was three or four other guys, fellows down there, I didn't help on the stretcher.

Q. He was brought out from the hold by stretcher? A. Yes, and the gear.

Q. And the winch?

A. The winches got him out of the hold.

Q. Now is it customary, Mr. McDonald, to use false hatch covers on ships?

A. No, the other hatch covers should fit. The other hatch covers should fit. We use false hatches where we put up a bulkhead, like here is your bulkhead. We do put false hatches in there so we can pull them out after we get their feeder box made—

(Testimony of Norman McDonald.)

pardon me, after we get our feeder box made, we can pull those false hatches out so we can work our pan in there. That's the only time we work with false hatches or are supposed to.

Q. At this particular time, Mr. McDonald, were false hatch covers being used prior to this accident?

A. No.

Q. Do you know whether or not instructions were given to put false hatch covers in lieu of standard hatch covers there on the ship?

A. After Mr. Strand fell, yes, we put in false hatches.

Q. Now do you know, of your own knowledge, as to what was done in regards to the strongbacks after the accident?

A. Well, the next day they were down there, had some burners down there, and they was straightening them up. They were heating them and pounding on them, getting them straightened up.

Mr. Jacobson: You may cross examine.

Cross Examination

Q. (By Mr. Wood): Mr. McDonald, I take it you have been a longshoreman for a good number of years, have you? A. 11 years, yes.

Q. 11 years. It is not so unusual, is it, for the strongbacks to be a little bit bent sometimes?

A. Oh, a little bit bent, yes, it is not unusual. Once in a while you have to put one in even on the top deck. You have to pry it in, but when you get any hatch cover, you can't get any hatch covers in at all, that's a little bit unusual, because——

(Testimony of Norman McDonald.)

Q. I mean the strongbacks are bent on voyages either because heavy cargo might lift and hit them, or probably carrying bulk cargo they are strained in some way; that's a fact, isn't it? [13]

A. Well, I guess something must have hit these because they were sure out of shape.

Q. Well, I say, you have seen that before, have you not?

A. Well, not as bad as that, as I recollect.

Q. Well, not as bad, you say, but you have seen it before where they were strongbacks that have been bent? That is not so unusual, is it?

A. No, I don't believe I have seen it. I have seen it where we had to use a little pry to get them in, get the hatch covers in, but I never seen them when you couldn't get them in at all.

Q. Haven't you seen them bent sufficiently so that you have to chock a hatch cover to make it stay in place? A. Yes, yes, I have seen that.

Q. You have seen them bent sufficiently so that in covering up——

A. That would be a short hatch cover we chock though. It's a little short, and you chock it on each end so it wouldn't slide out and go down.

Q. That's right.

A. That's not strongbacks; that's the hatch cover that is short.

Q. Well, the same thing happens if the strongback is bent a little. That makes the hatch cover short, doesn't it? A. Well, at times, yes.

Q. Isn't it a fact that you often have to select

(Testimony of Norman McDonald.)

certain hatch covers to go in certain parts of the hatch to fit, don't you? In other words, you have to sometimes take a hatch board and put it [14] in one place on the hatch and another hatch board of a slightly different length on another part of the hatch?

A. Yes, that happens once in a while on a Liberty.

Q. In fact, that is——

A. Maybe a short hatch, maybe you have to have a long hatch and a short one, maybe half an inch difference in them. You may have to change them around.

Q. In fact, they even number the hatch boards to make sure they will go exactly in the same spot all the time, don't they?

A. No, they are numbered to a certain extent but on Liberty they fit, or are supposed to be all uniform. There is one little short hatch on some of them on one end. It is according to where they were built. Of course, you couldn't confuse them with the other hatches because they are a foot or so shorter.

Q. Have you ever encountered hatch boards that were too long? A. Yes.

Q. What did you do in that instance? How did you make them fit?

A. How did we make them fit? Well, it's according to how, too long they were. I have been on foreign ships where I have seen the crew cut them off, make new ones.

(Testimony of Norman McDonald.)

Q. At the resquest of the longshore boss, or what?

A. At the request of the walking boss, yes.

Q. Now you said that when you went to work on the 'tweendeck hatch you told the walking boss that these things were too—that they wouldn't fit? [15]

A. Yes.

Q. What did he do, tell you to go on working anyway or what?

A. Yes, he said, "They come out of there; they have got to go back in."

Q. What?

A. He said, "They come out of there; they have got to go back in."

Q. Who was the walking boss?

A. Oh, Charlie, at the job, Charlie Pelletier at the job.

Q. Pelletier, so you men protested to the walking boss, and he said go ahead and do the work anyway; is that correct?

A. Well, do the same thing. He said, "They come out of there," and he said, "they should go back in."

Q. But you then gave up trying to work on the hatches and you went down below in the hold?

A. Yes, I was going to land some lumber, lower hold lumber, another fellow and I.

Q. What was the purpose of covering the hatch anyway?

A. Well, we have got to cover the hatch because you have got to stand there. You have got to pull up timbers. Then you have got to pull up this lining to

(Testimony of Norman McDonald.)

make this shifting board. You have got two men. You have got to have a footing to stand there, and after you get the shifting board up from the lower hold then you have got to build your feeder box. You have got to have a place to walk down there.

Q. In other words, you wanted it for a stage to walk on, is that right?

A. Well, yes, in a way. It has got to be there to work on. You have got to have it. You cannot stand in space there, you know, with them hatch covers on.

Q. Well, that's what it amounted to, a stage from which you men could work to build a bulkhead; is that it?

A. Well, yes, then you have to use it on the shelter deck, too. You have to use it there, too, because you are building this feeder box around there. It's a square box. You have got to have a place to walk to get your lumber in there and everything.

Q. If you just wanted to use it as a staging from which to erect the bulkhead you could have just laid on boards across those beams whether they fitted or not, and stood on them, couldn't you? A. No.

Q. Why not?

A. Well, I was just trying to tell you, after all, you have got to take the hatches out. We are going to take all these hatches out afterwards so they can get the planks out in the feeder box. If we put on planks across there we couldn't get the planks out after building the feeder box.

Q. Is there a piece of a chock here?

A. There is one right on the end of the——

(Testimony of Norman McDonald.)

Q. Somebody has around here hold No. 4, fore and aft. Do you [17] recognize what this is supposed to represent? These are, I suppose, the strongbacks, are they? A. That's right.

Q. Are there many strongbacks in the hatch?

A. Five.

Q. One, two, three, four, five? A. Yes.

Q. Is that right? A. Right, yes.

Q. You were working underneath them down below in the hold? We are looking down now?

A. I know what you mean. No, first we try to put our, first we tried to put our hatch covers on. They were all off. There was no hatch covers on.

Q. They were out in the wing?

A. They were out in the wing, yes.

Q. You went and selected them?

A. That's right.

Q. Then what?

A. They wouldn't fit. Once in a while one would go in; once in a while you wouldn't, as they wouldn't fit, I said, "It is no good. We can't get them in," I said, "I won't——" and I went down to the lower hold to work with this lumber.

Q. You said, "I won't", and then stopped. There was no other——

A. Well, I said, "I won't try to put them in there, and do something else. [18]

Q. Who did you say that to, the walking boss?

A. No, myself. He wasn't there. This other fellow and I went down in the lower hold. Well, I said to him, "You can't get them hatch covers in there,"

(Testimony of Norman McDonald.)

I said, "the way they should be," and I said, "Let's go down and land the lumber." So then we went down in the lower hold.

Q. But the point I have in mind, Mr. McDonald, is simply this. You were not covering those up for any cargo; you were making a platform on which the workmen could stand while they were erecting this bulkhead from the shaft alley upward; is that right? A. Yes.

Q. So you could have taken any kind of boards and laid them across those strongbacks, and if they were long enough to cross the strongbacks, you could have used them as a platform, couldn't you?

A. No, that's what I was trying—you see, if this—we are looking at it this way. This goes up this way. Well, we put the box in there, a feeder box they call it, feeder box. Well, you might—the end of it might come right here, see? (Indicating.)

Q. Yes?

A. Well, we take the other hatches out. We have got to put false hatches in here. Then we put boards across so the end of it is here, and then when we get through we can pull them 2 by 12's out, you see, use a false—they call them false hatches, see?

Q. But for the purpose of erecting the bulkhead underneath, [19] which was the only thing you were doing at this time, any boards would have done there, wouldn't they, as long as they stretched from one to the other?

A. Well then, we would have to take them all out again.

(Testimony of Norman McDonald.)

Q. Maybe you would. A. Yes.

Q. But it wasn't necessary that they fit nicely in the flanges to give you a staging to lift boards up from the lower hold in making the bulkhead, was it? They didn't have to fit nicely for that purpose, did they?

A. Why, yes, the man that is pulling up there, he has got to have some place to stand. He has got to have a good backing or something. He has got to have it covered up.

Q. You say some of the hatch boards fit, and some did not; is that right? A. Yes.

Q. Why was that?

A. Well, because the beams were all sprung out of shape. They were bent. There is a flange number up on top of the beams.

Q. I will ask you, did they fail to fit because they were too long or too short?

A. Well, they wouldn't go in to the what-you-call-it. That was bent over. Some of them was bent.

Q. In other words, the hatch boards were too long; is that right? [20]

A. Yes, too long and too short.

Q. Both?

A. Yes, I guess you would say that. I guess you might say that, yes.

Q. Where did you get these false hatch covers from with which you covered the hatch afterwards?

A. We had to cut them, to cut them for size.

Q. Where did you get the lumber?

(Testimony of Norman McDonald.)

A. Lumber? On deck. They sent them in to us from the deck.

Q. It was there available all the time then before? A. Oh, yes.

Q. You could have put them on before the accident? A. Could have, yes.

Q. Why didn't you?

A. If you gave us the lumber, if the walking boss gave us the lumber we probably would have, and told us to put them in there.

Q. Well, when you protested to the walking boss that these hatch covers would not fit, did you make any request, or did this libelant, Mr. Strand, make any request for false hatch covers or anything?

A. Well, I just don't remember, but I remember telling him a couple times though.

Q. The walking boss, you mean?

A. Yes, that there wasn't, it wasn't safe to work there. He said, "They must have come out of there," he said, "so put them [21] back in again."

The Court: How did that accident happen? You tell me your view of it, will you?

Mr. Wood: Me tell you my view?

The Court: Yes, you tell me your view.

Mr. Wood: Well, my information is, your Honor, that there was—is this, yes, this is the foreward starboard corner.

The Court: Is that where he fell in the hold?

Mr. Wood: Yes, he fell there. (Indicating.)

The Witness: Forward.

Mr. Wood: And there was some hatch covers,

(Testimony of Norman McDonald.)

two or three of them there, I don't know just how many, and one or two there, two or three there. These were long and lapped over this strongback. They were too long to sit down in the flange and Strand stood on one of these, and with a pry he tried to pry this one into place. (Indicating.) He tried to pry it forward a little bit so it would slip down on the flange and inside. He pried himself. Then he pried this board that way a little bit so it fell into the holds.

The Court: Is that your understanding?

The Witness: I believe that is the approximate way it was done.

The Court: All right.

The Witness: But I don't know the exact location. [22]

Q. (By Mr. Wood): When you first went there the whole hatch was uncovered, was it?

A. Right.

Q. Such hatch boards as were put in place there were put on, put in place by some of you longshoremen, weren't they; is that right?

A. Yes, that's right.

Q. In other words, not by the ship's crew, but you men were doing the work? A. No.

Q. Now who ordered the false hatches put in?

A. Well, after Mr. Strand fell, you mean?

Q. Yes. A. The walking boss.

Q. From then on everything fit, and it was all right?

A. Well, yes, cut to size, to fit, yes.

(Testimony of Norman McDonald.)

Q. I say, they were cut and fit and everything went all right? A. Yes.

Q. The accident happened because that was not done before the accident instead of afterwards; is that right?

A. Well, I suppose you could say that. I don't know, but——

Q. Did you consider it a dangerous place to work? Is that the reason you left and went down into the hold? You thought it was a dangerous place to work? [23]

A. Yes, because we couldn't, well, we had to land lumber down there anyhow, a couple sent down to land lumber. There was no use putting them hatch covers on when they don't fit.

Mr. Wood: That's all.

The Witness: And they had to stay on deck to pull up the timbers. They had to stay on deck to pull up the timbers, and they got a place to stand.

Mr. Wood: That's all.

Redirect Examination

Q. (By Mr. Jacobson): I want to ask one or two questions, Mr. McDonald. Is it customary in preparing the ship for grain and lining it to use 2 by 12's to put over across the beams in order to provide a working space or a safe place for a person to work in order to pull up the timbers?

A. Well, we always use hatches. We always use hatches.

Q. That is the customary procedure, is to use the hatches available on the ship?

(Testimony of Norman McDonald.)

A. That's right, yes.

Q. You don't use 2 by 12's running across your strongbacks?

A. No, like I said a few moments ago, at the end of the feeder box, you see, they use false hatches there so we can get them out from under the feeder box so to make it clear for the pan when they pour wheat, on both ends they use false hatches, and in center, why, it is the other hatches. [24]

Q. Well, is it customary to start cutting 2 by 12's to make false hatches automatically in preparing a place for the longshoremen to stand when they are lining the ship? A. No, it is not.

Q. The fact is that the longshoremen use the hatch covers that are available on a ship to provide a working or a staging area for them to carry on the job? A. Yes, at all times.

Mr. Wood: I object to that, your Honor. That certainly must vary with the circumstances.

The Court: It has all been covered.

Mr. Jacobson: That is all.

(Witness excused.)

Mr. Jacobson: Call Mr. Olof Hegrenes. [25]

OLOF HEGRENES,

called as a witness in behalf of the Libelant, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jacobson): You were a member of the crew, longshoreman crew, that was working on

(Testimony of Olof Hegrenes.)

the Stathes J. Yannaghas, a Greek ship located at the Clark & Wilson Dock, in Portland, Oregon?

A. I was.

Q. Were you working there on or about the 12th of December, 1950? A. Yes.

Q. Was Mr. Olaf Strand a member of the gang at the time? A. Yes.

Q. What type of work was your gang supposed to be doing on that ship?

A. Lining for wheat.

Q. That is building a false bulkhead in the lower hold; is that correct?

A. Yes, shifting boards in the middle of the ship.

Q. And in doing so is it necessary to have some of the lumber hauled up by ropes from the 'tween-decks?

A. Yes, you got to pull some of the timber up from the hold, the ship timber.

Q. At the time you were working down there, do you recall the hold No. 4. Would you know where that was located? [26] A. Yes.

Q. Did you check as to the condition of the strongbacks on that hold? A. Yes.

Q. What was the condition?

A. They were bent.

Q. Now were you one of the men that put down some of the hatch covers at the time you went over to hold No. 4?

A. No, I wasn't down in the hold.

Q. When you say that the strongbacks were bent,

(Testimony of Olof Hegrenes.)

what do you mean by that? I mean, in which way were they bent?

A. Well, like, take a straight line. They are bent in the center. You hit them with something, naturally, a straight line will be off. It will bend in the—it won't be straight any more.

Q. What in regards to the top part, was that straight or bent, the flange?

A. On the top deck out on the flange?

Q. Yes. A. They were also bent.

Q. Now is that a normal condition of the strongbacks on ships? A. No.

Q. What effect does the fact that the strongbacks are bent and the flanges are bent have in putting in the hatch covers on top of them into the flanges? [27]

A. The hatch covers won't fit if they are bent. It can't fit because the hold is all alike. It has got the same length, and it can't fit if the strongback is bent.

Q. Now, was that the way you found hold No. 4?

A. Yes.

Q. When you were, you and the rest of the members were working? A. Yes.

Mr. Jacobson: Your witness.

Cross Examination

Q. (By Mr. Wood): Are you the man whose nickname is "Horseshoes"? A. How?

Q. Is your nickname "Horseshoes"?

A. No.

(Testimony of Olof Hegrenes.)

Q. Just where were you working at the time Mr. Strand fell?

A. On the deck. I was a hatch tender.

Q. On the 'tweendeck? A. No, top deck.

Q. Did you see him fall? A. No.

Q. Then all you knew about it then is the condition of the strongbacks and the hatch covers; is that it? A. That's all I do.

Q. You have seen strongbacks on other ships that were not exactly plumb and true, haven't you?

A. Lots of times.

Q. Don't they in those cases sometimes have to fit special hatch boards to certain places on these beams? A. Sometimes they have to, yes.

Q. Sometimes they even number the hatch boards, don't they?

A. They are numbered, yes.

Q. So that they will be sure to go in exactly the same place on the beams every time; that's why they are numbered; that's right isn't it?

A. Yes, but in this particular case the hatches was all alike. They were all the same length, and when a strongback is bent, naturally, it will not fit.

Q. Well, when you longshoremen find a hatch board that is too long to fit what do you do to remedy that condition?

A. We either have to cut it off, or we have to make a new one.

Q. Do you do that?

A. In some case, in some cases we have to do it

(Testimony of Olof Hegrenes.)

if we—if we want a hatch in there we have to do those things.

Q. If you find a board that is too long to fit do you report that to your walking boss or hatch boss?

A. Oh, we do.

Q. Well then, what is done?

A. He says to make them fit.

Q. What?

A. We got to get them to fit. We got to cut a new hatch board. [29] If we are going to have to fill in that place where it is too long or too short, we got to cut it, work with it, and fit it in if it won't fit in.

Q. Is that what you generally do?

A. In some cases we do.

Q. Well, in what cases do you do it, and in what cases don't you do it?

A. Well, if you want—if we have to work there, if we got to work there and they have to be cut to fill in, we have to do those things.

Q. You have to make them fit?

A. We have to make them fit or else where we got to straighten a strongback.

Q. And you report that to your walking boss, do you? A. I do.

Q. Then the walking boss gets some other hatch from the ship, and you men fit it; is that right?

A. Sometimes, yes.

Q. Well, you didn't work on this hatch yourself, did you? A. I was the hatch tender there.

Q. You were a hatch tender there?

A. Giving signal to the winch driver.

(Testimony of Olof Hegrenes.)

Q. Did you make any report to the walking boss whether the hatches wouldn't fit before the accident?

A. It was not necessary to make any report to that effect because [30] the walking boss saw that the hatches wouldn't fit. He saw it himself. It was not necessary to make that kind of a report.

Q. I see. Well, did you make any protest about working there?

A. We only called them to the attention, what the hatches were too short, and we couldn't make them fit except by making new hatches in there, and we was not directed to do those things.

Q. What I asked you is, did you protest to the walking boss and say, "This is dangerous, we don't want to work here?"

A. I personally did not protest. That's all I can say, personally. I didn't protest none.

Q. You didn't hear anybody protest, either, did you?

A. Not except that they were talking about it, it wasn't safe to work there. I heard that mentioned amongst the men.

Q. Did you hear the walking boss say anything about it? A. I can't recall that.

Q. No. That's all, Mr. Hegrenes.

Redirect Examination

Q. (By Mr. Jacobson): Mr. Hegrenes, in this particular ship were any of the hatch covers numbered? A. No, they wasn't.

Mr. Wood: He said they weren't.

Q. (By Mr. Jacobson): Isn't it a fact that the

(Testimony of Olof Hegrenes.)

hatch covers in this ship, or all Liberty ships have two metal bands on the edges of the boards? [31]

A. That's right, and that makes, steel wires that makes it solid because they are iron against iron, and they slip very easily.

Q. Could you cut those down in order to make them fit into the—between the strongbacks?

Mr. Wood: I object to that question. He said the men could ask for another hatch board to be supplied by the ship, another one to make it fit.

The Court: Ask the question again.

Q. (By Mr. Jacobson): Could the hatch covers that were there be cut in order to make them fit into the hold?

The Court: Answer it.

The Witness: You would have to take the iron band out first before you could cut them.

Mr. Jacobson: That's all.

Recross Examination

Q. (By Mr. Wood): Another way of doing it, Mr. Hegrenes, is if, if you get a hatch board that is too long, is to nail a cross block across the end of it to keep it sliding, from sliding up over the flange; isn't that true?

A. That probably could be done, but customarily is never done.

Q. You have seen it done, haven't you?

A. I have not seen that done.

Q. Well, all right, that's all. [32]

Mr. Jacobson: That's all.

(Witness excused.)

Mr. Jacobson: Call Mr. Steckel. [33]

JAMES R. STECKEL,

a witness called in behalf of the Libelant, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jacobson): Mr. Steckel, were you the gang boss of the longshore gang that was working on the Stathes Yannaghas, the Greek ship that was berthed at the Clark & Wilson Dock about December 12, 1950? A. I was.

Q. Was Mr. Strand a member of this particular gang? A. He was.

Q. What work were you and this gang required to do on the ship?

A. We were required to make the ship ready for bulk grain and bulk cargo.

Q. That means that you had to build a false bulkhead or lining, what is commonly known as lining ship? A. That's right.

Q. Now, where did you have your crew working, what part of the boat?

A. Well, we started in the morning in No. 3. It was, I am certain, in No. 3. After we got the shifting board in we went back to No. 4, and after we finished the lower hold of No. 3 we went back to No. 4, and when we got to No. 4 hatch all of the strongbacks was off, and immediately I told the gang, "Put the strongbacks in." They proceeded to put the strongbacks in, and when they got into

(Testimony of James R. Steckel.)

the midship hatch, about the middle of the hatch here, [34] went to put the strongback in, it wouldn't fit so we had to juggle three different strongbacks to find the one that should fit, because the strongbacks were bent a certain way that they would not fit, and the ship seemed like it had been squeezed together, the hold been squeezed together, and after they got that fit in, the reason of it was so the men —there was no lumber ready for the hold yet. They were sorting the lumber on the dock and want to cover up the after end of the hold to keep the men busy. I was ordered to instruct them to cover up the after end of the hold so they went ahead and placed it, and by that time there was some of the lumber coming out there, and I had went up on top, and in the meantime Mr. McDonald had went to the lower holds, and when McDonald went down with his partner into the lower holds to land this lumber I never knew it at the time, but as going down after Mr. Strand fell—I might be getting ahead here, your Honor, but I wish to state that there was rungs off the ladder, and as I ran down from the top deck, come down, went to go over to the shaft alley, a rung broke off right in my hand from the ladder down over the shaft alley. That was the reason McDonald and them went below was because this lumber from the lower hold had come out on the dock. They had brought it over there.

Q. Now what type of work did you have Mr. Strand do in the crew?

A. Mr. Strand and Mr. Ramsby, being the last

(Testimony of James R. Steckel.)

two men on the pad, which is customary in lining operations, the last two men on the pad, they do the shelter deck work. What I mean is, when they are [35] working down below they pull up the planks for the shift boards, for the center and the upright.

Q. The shelter deck was the same as this 'tween-decks? A. That's right.

Q. And their job was to pull up some of the boards from the bottom hold and hold it; is that correct? A. That's right.

Q. Until they were nailed on into place?

A. That's right.

Q. What other things did they do with those ropes?

A. Well, they just—with the ropes, that is, pulling up, that was their job there, and then they made the beam fillers, and also had to cut the head shores that fit in to hold the shores that come up in the midship that holds these planks.

Q. Now, in order for them to be able to lift the timbers from the lower hold into position where do they have to be standing?

A. Well, they would have to be standing in the midship, and the reason for the covering of the hold, one of them is safety, to have the ship as secure as you possibly can for the men working, when they are working, and safety is stressed, and, therefore, we always cover the holds up and just leave one out along the center when they are working down below so that when they pull these uprights up, these uprights will extend up there, and there

(Testimony of James R. Steckel.)

is nothing to secure them to so we nailed a 2 by 4 or something across to hold the uprights in place until we get the center line in and the head shores [36] in, and that is our reason, one of the main reasons, too, is to have a secure place to hold your uprights that are put in the fore and aft, on your fore and aft shifting board.

Q. In other words, you have to use, sometimes you use the hatch covers to keep in line the uprights from the holds up to the 'tween-deck?

A. That is right.

Q. And in addition to that it has got—the men have to have a place to stand on in order to lift the timbers up and to hold them in place while the other men down below nail them into position?

A. That is right, the main reason of covering that up, we try to keep it covered up, that's the most a man can do, at the most would be to stick his leg through a hole, at the most, so that he would not fall into the lower hold at any time.

Q. Now, do you recall the condition of the strongbacks that were put in by your men?

A. I definitely do because they had to juggle the three that was in the midship. It would be approximately three they had to juggle, had to juggle them back and forth until they found a correct one that fit there because the ship was just jimmed in. I may further state that the ship was being worked under protest because the Safety Engineer had been called early in the morning, and he had not been around there, and the gang working No. 2 hatch

(Testimony of James R. Steckel.)

was under the same conditions, working definitely under [37] protest.

Q. Will you show the witness those pictures, please? You have before you Libelant's Exhibits 1 to 6 inclusive, and I wish to ask you whether or not those pictures represent the condition of the cross beams on the day of the accident?

A. They do, these here I have seen so far.

Q. Now, you will notice in those pictures there are some false hatch covers. When were those put in?

A. They were put in—I was ordered to have the gang put them in by the walking boss, Charlie Pelletier, to put those in after Strand had fell into the hold.

Q. Well, why were they put in?

A. Because the hatch beams was strung, some of them as much as, I would say six inches, because in the center of some of them if you had took the hatch cover out there to the center the hatch cover would have fell right on down through, and on the other side the hatch cover would be three or four inches hanging up over the top of the beam out in the midship.

Q. Is it customary to put down 2 by 12's in lieu of the hatch boards in order to make a staging place for the men to work?

A. Only in one place that were put down 2 by 12's, and that is where they fasten in uprights in the feeder box, and it is according to the type of feeder box you are building that you place, and if

(Testimony of James R. Steckel.)

you should get a square feeder box in the square of the hatch, then you generally have one section of the hatches [38] in the middle of it and opens on both ends, but it is fit, planked in solid.

Q. Now, what is the usual procedure so far as covering up the hold, are the hatch covers used, or do you use timbers that are available?

A. To cover the hold?

Q. Yes.

A. We always use the hatch covers for the main reason, as I stated, safety to keep the men from falling down below, and also to land our lumber we must have a place to land this lumber that we are to use.

Q. Why don't you use 2 by 12's instead of the hatch covers?

A. Because 2 by 12's would be in the road for one reason, and it would not be safe.

Q. In regards to the flanging itself on these cross beams, were those in good condition on the strongbacks?

A. They were in very bad condition.

Q. In what?

A. They were bent and flanged over and beat down. As the Mate had stated to me on the ship, he said that they had had some heavy cargo in there that had got away from them, and when they took it out the winch drivers was very careless, and it just banged it around.

Q. Are there any pictures that you see there that show some of the flanges bent over? [39]

(Testimony of James R. Steckel.)

A. That is right, here is one that definitely shows a beam that is very badly bent.

Q. There is a number on the back. Will you identify it that way?

A. Exhibit 5 shows a very bad strongback.

Q. Was that the condition that the beam was in at the time of the accident? A. Let me see.

The Court: Who took these pictures? Well, who, you lawyers or——?

Mr. Jacobson: They were taken by the company representing the compensation outfit, and we just took a set of them. We don't know exactly the photographer.

The Court: Well, you didn't take them. You didn't have them taken?

Mr. Jacobson: No, we did not have them taken. A fellow by the name of Butterworth.

The Court: Ask him another question.

The Witness: No. 4 is the exhibit, I would say.

Mr. Jacobson: Your witness.

Cross Examination

Q. (By Mr. Wood): Mr. Steckel, this work was being done by W. J. Jones & Son; isn't that right?

A. That's right.

Q. Do you work for them all the time? [40]

A. I do not.

Q. Now, you were hatch boss for this particular hatch, were you?

A. I was hatch boss for the particular gang.

Q. I see. You said that the ship was being worked under protest; didn't you say that?

(Testimony of James R. Steckel.)

A. That's right.

Q. What did you mean by that?

A. Frank Novak, gang boss of the other gang that was working No. 2 hatch, had called the water-front Safety man. I can't definitely say his name. I did have a card with his name on. I was looking for it, and I couldn't find it.

The Court: Who chooses the gang boss?

The Witness: The gang boss in our hall is—if you are first up there and down low in earnings and get up close enough to the head of the board and you are lucky enough to get to be the gang boss and the lining job.

Q. In the statement here that we have which you are said to have made but didn't sign—I will show it to you if you like—you say, "We started to work without protest in No. 4."

A. I had not known of——

Q. Right down there. (Indicating).

A. I remember that because I told you.

Q. You didn't tell me. I never saw it.

A. No, but I am telling the truth. That's what I am here to say, is the truth. No. 2 hatch was working under protest all day. [41]

Q. Yes?

A. I went back to No. 4. I had not known of what went on, took place in No. 2 hatch.

Q. Nothing took place in No. 2?

A. No, but I mean, I didn't know what that gang had done up in No. 2.

Q. Yes?

(Testimony of James R. Steckel.)

A. And I come back and was moved into No. 4 hatch, went in there and went to work, and here was these strongbacks, and we were trying to——

Q. Fit the boards in?

A. Yes, fit the hatch covers in. In the meantime, I had left, and when Strand had fell I was just coming back up the gangplank from getting my lumber, and I did not know what the situation was prevailing back there in the after end because I had worked out of the hold. I went down, told the boss. The orders had been handed to me when I come back here was this——

Q. Well, to cut it short, you went to work in No. 4 hatch without any protest?

A. Well, I never knew the conditions of No. 4 hatch to tell how the hatch covers were. A lot of times you may run into a beam you will have to shift around.

Q. When did you discover that these beams were bent in some?

A. Well, you could see them bent before——

Q. No, but when before the accident did you find out? [42]

A. Yes, I found out before that they didn't fit in the middle beam, didn't ever fit.

Q. That's what I say. Then you worked there with that knowledge and without making any protest; that's right, isn't it?

A. Well, I am not the only one to make the protest, you see, I am just a gang boss. The gang can protest, and I have to follow out.

(Testimony of James R. Steckel.)

Q. Well, just as you said a moment ago, what we want is the truth out of this.

A. That's right.

Q. As far as you know, anyway, nobody made any protest about working there in No. 4 until after the accident?

A. Yes, I was out on the dock when McDonald made a protest.

Q. After the accident?

A. No, before the accident. He protested and went to the lower hold.

Q. Oh, yes, he said to the walking boss, "This won't fit," and he went below?

A. Yes, that's right.

Q. That's what you mean by protest?

A. That's right, protested there.

Q. But you made no protest for the gang although you were the gang boss?

A. I have no say—I am to tell them what to do, and if they come to me and say, "Well, that's not safe," then I have to take it up. [43]

Q. Did you have anything to do with procuring the false hatch covers after the accident?

A. For your information——

Q. Everybody's information.

A. And my information. These bulk cargo ships come in here——

Q. Just answer the question. Just answer my question. A. Yes.

Q. Did you have anything to do with getting the false hatch covers?

(Testimony of James R. Steckel.)

A. I was ordered to put in false hatch covers by the walking boss.

Q. I see.

A. But the reason, what they tried to do is conserve as much lumber as they possibly can.

Q. Who does that?

A. There was a Government job, Government contract, and Uncle Sam says so much lumber for the job, and that was that.

Q. Well, was W. J. Jones furnishing the lumber?

A. They were doing the work for the Government.

Q. But the lumber was there when false hatches were needed. They were taken from that lumber, weren't they? A. Yes.

Q. Well, they were?

A. They got the lumber somewhere. I don't know where they got the lumber. [44]

Q. Now in this statement you describe how the accident happened, that Strand was standing on a board trying to pry the board forward into place, and the one on which he was standing then slid, and he fell, but in another part of the statement you say, "I was out on deck so I didn't see it happen."

A. I was told, the report was told to me.

Q. Well then, I won't ask you about that. Now, you said in the earlier part of your testimony that you used hatch boards to cover up on a job like this because you were primarily concerned with the safety of the men working; do you remember saying that? A. That's right.

(Testimony of James R. Steckel.)

Q. So it is your job as hatch boss and the job of the walking boss to see that the place is safe for your men to work, isn't it?

A. That's right.

Q. Well, when, therefore, you saw that the beams were bent and the hatch boards were not fitting, why didn't you or the walking boss do something about getting other boards for doing anything to make the place safe since that was your chief concern?

A. As I explained before, I can't be two or three places at once. I went below, told the men what the score was, what the work was that was lined out, and I went out on the dock to see that they were getting my lumber for me. I had a sheet for so much lumber to get for the holds, certain pieces, and I was telling the fellows that was slinging it what pieces to sling for what side of the ship because we line some on one side and some on the [45] other, on the shaft alley side down there in the lower hold.

Q. Do you mean that you at that time had not appreciated that the place was dangerous to work, is that what you mean?

A. As soon as they had the strongbacks in, and I went down below, on the strongbacks, two boys had started to cover up when I went up the ladder and went out onto the deck and onto the dock to get the lumber because I wanted to get the lumber and get started down below so that they could cover the rest of the hatch up.

Q. I don't think you are trying to answer me.

(Testimony of James R. Steckel.)

I don't think you really listened to my question. Now, you have already told us that your primary concern of you and the walking boss is to make the place safe, hadn't you? That's true, isn't it?

A. It is true on any job.

Q. Yes, and you and the walking boss are responsible for that, aren't you?

A. Well, I would not definite say so because the men just as well can see a lot of things that we can't see.

Q. Well, all right, then the walking boss and the men themselves are responsible for making the place safe to work on? A. That's right.

Q. Now then, apparently you took no steps to try and make it a safe place to work. I am only asking you why you didn't, that's all.

A. In explanation to you, I went out on the dock to get some lumber. [46]

Q. And at that time you had not appreciated that there was any danger, is that right?

A. I couldn't tell you whether them hatch covers are going to fit down there because in a Liberty ship in all of the 'tween decks or shelter decks as you wish to call it the hatch covers, except maybe up on one end next to the ladder, there is a short section in some of them which is definitely so short that you could tell the difference because it is only about half a length, but the rest of them will fit without any trouble at all. They all fit the same place.

Q. Does it come to this, that until after the ac-

(Testimony of James R. Steckel.)

cident you personally had not realized that those were dangerous; is that the substance of it?

A. Well, I was not there so I—at the time I was out on the deck and down on the dock.

Q. What was the walking boss?

A. Charlie Pelletier.

Q. Did you hear Mr. McDonald testify that he protested to Charlie Pelletier, and Charlie Pelletier said, "Well, the boards came out of there. They have got to go back in?"

A. I definitely did not because I was on the dock.

Q. I mean, you heard him testify?

A. That's right.

Q. But you did not hear the conversation?

A. I did not hear the conversation. [47]

Mr. Wood: That's all.

Mr. Jacobson: That's all.

The Court: Don't put on any more cumulative testimony. Put on your plaintiff now.

Mr. Jacobson: Well, your Honor, this man worked with Mr. Strand on the same job. He actually saw him go down. Call Mr. Ramsby. [48]

LEROY RAMSBY

a witness called in behalf of the Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Jacobson): Mr. Ramsby, you and Mr. Strand were members of a gang of longshoremen working on the Stathes Yannaghas?

(Testimony of Leroy Ramsby.)

A. Yes.

Q. On December 12, 1950, in Portland, Oregon?

A. Yes, we were.

Q. And will you tell to the Judge what type of work you were required to do and when you first started, and what you did?

A. Lining, it was lining work.

Q. Where did you start to work?

A. No. 3 hold.

Q. Then, what was your job and Mr. Strand's job on the No. 3 hold?

A. In the, in 'tweendecks.

Q. What type of work were you doing there?

A. Well, we lower stuff down like hammers, saws, nails, raise timbers, stuff like that.

Q. And in doing that do you and Mr. Strand provide yourselves a place to stand?

A. Yes, we do.

Q. And what did you use? [49]

A. We used the hatch covers.

Q. In the No. 3 hold? A. Hatch covers.

Q. Did the hatch covers in No. 3 hold, did they fit all right?

A. We never had any trouble in No. 3. Everything was okeh in 3.

Q. You and Mr. Strand actually put all of them in No. 3, made yourself a place to work?

A. Yes, No. 3 was safe.

Q. Then who told you to go up to No. 4?

A. The gang boss.

Q. That is Mr. Steckel? A. Yes, sir.

(Testimony of Leroy Ramsby.)

Q. When you got to No. 4, did the whole gang go up to hold No. 4?

A. Yes, they did, the whole gang.

Q. Do you recall what was done there at the hold No. 4 by the gang?

A. Well, we put the strongbacks in first. We had trouble with a few of them fitting them.

Q. After the strongbacks were put in there were any hatch covers put in by some of the gang?

A. By the gang, yes.

Q. Now, did they put in all of the hatch covers?

A. No, just part of them. [50]

Q. Then what happened to the gang?

A. They went down below to work down below.

Q. And left you and Mr. Strand on the 'tween-deck? A. Yes, they did.

Q. Now, tell the Judge what you and Mr. Strand did?

A. Well, we covered up the balance until the accident happened, fore and aft of the ship, a row at a time to midships.

Q. Where would you go on your hatch covers?

A. To the forward end.

Q. You would pick up one, and how heavy are those hatch covers?

A. About 50 pounds, or 60.

Q. Are they easily handled by one man?

A. No, one man cannot hardly handle them alone.

Q. Isn't it a fact that they have two handles in some way that two men can handle them?

A. Yes, that's right.

(Testimony of Leroy Ramsby.)

Q. You and Mr. Strand would go to a pile, pick up a hatch cover, and put it down in place?

A. That's right.

Q. What is the customary way of doing that?

A. Fore and aft of the ship, one tier through, and another tier through, and so on.

Q. Well, point out that to the Judge.

A. You start right from you, you see, here is the inshore side, a cover, cover, cover down all the way and back down on fore and [51] aft so, in other words, that makes your footing as you walk along.

Q. Now, can you tell the Judge about where in relation to the hold you and Mr. Strand were working when the accident happened?

A. It was just about direct over the shaft alley. That would be about right here, about four sections over. (Indicating.)

Q. Point out exactly what was being done. How did it occur?

A. Well, a beam was sprung right just where, it was sprung, in other words, right there in the midship about in here, the beam, the flange here, about this, four inch high down here, wavier, bent down pretty bad. We didn't put it right on the bad place. We tried to put it on this side when the accident occurred, when we was prying on that with a 2 by 4.

Q. You took one of the hatch covers, put it down, and found it would not fit; is that correct?

A. Well, they wouldn't fit, naturally, because the whole beam was sprung.

Q. One of them wouldn't fit?

(Testimony of Leroy Ramsby.)

A. That's right.

Q. Now, do you know who went over and got the 2 by 4? A. I couldn't say for sure.

Q. A 2 by 4 was picked up by one of you?

A. Yes, one of us, yes.

Q. Where was Mr. Strand standing in relation to the one you were trying to put in place?

A. I was standing on one side; he was on the other side. Evidently [52] I was standing on the solid one, and he stepped over with one foot on the loose one when he attempted because we were both using the same stick to pry with, but possibly my foot caught it, too, for all I know, but, fortunately, I was on the right-hand side, and I was on something solid, and that curled the loose one up. I guess that's what happened.

Q. Do you recall whether the one he was standing on was one of the hatch covers that you and he put down?

A. No, I don't think we put that one down. I am quite sure we didn't.

Q. Just what happened when he fell? I mean, how quick did that——

A. Well, it happened so fast I really didn't, just saw a flash, and that's all I saw, just zing, just happened so quick, that's all I know.

Q. Do you know whether the hatch cover he was standing on fell with him? A. Yes, it did.

Q. He didn't fall forward over the hatch cover that you and he were trying to pry in?

A. I was concentrating so much on the, on what I was doing, but I really think he fell on the coam-

(Testimony of Leroy Ramsby.)

ing, hit his face in between, as he went down in between the strongbacks.

Q. Why was it necessary for you to try to use a 2 by 4?

A. Well, we was trying to pry a cover in place, a hatch cover. It wasn't so bad there, you see, a wavy part was right here. [53] (Indicating.) We was about this side of it, and we just about had it in place when the back one kicked out.

Q. How far did you have to try to pry the strongbacks in order to fit in this hatch cover you were working on?

A. I couldn't definitely say. That wasn't far from being in place, and when we was prying on it we could just about tell when we was prying, you see.

Q. Do you know whether the flange, vertical part of the flange, was straight or crooked at the place?

A. No, it was wavy. It was like this. (Indicating.) It was "S" shaped right in there.

Q. Well, the waving of your hand does not describe it in the testimony.

A. Oh, I see, pardon me. Here is the flange right here. (Indicating.) You see, it was like this. It was curlicued right in there, the top of it there, see, about half the distance down in the flange. (Indicating.)

Q. Was that the only strongback that was out of line or warped?

A. There were several out of line. The whole ship was out of line, in my opinion. The whole hatch

(Testimony of Leroy Ramsby.)

was caved in or something. There was several out of line but not too bad, and it was a couple strongbacks pretty bad shape. One particularly was bad shaped.

Q. What about the flanges? Were they bent over or vertical?

A. Well, there was some of them wavy, but the worst one, I don't know which, exactly which flange, but one was really bad, the [54] flange, yes.

Q. Now, normally, when you were starting to work on this hold, these hatch covers, they fitted very nicely at first; did they not?

A. Yes, along the coaming they fitted swell, but close to midships when we got out a certain distance where the worst, evidently, like McDonald said, that strain come and buckled the center someplace. It must have been——

Q. How long have you been with the longshoremen, Mr. Ramsby? A. Since 1943.

Q. On these ships, the hatch covers, do they normally fit without any wedging or effort?

A. Yes, they do on these ships. Some ships they don't fit too well.

Q. On this ship here some of them fitted very nicely; is that right?

A. Yes, that's right.

Q. Do you know what was done after Mr. Strand fell in regards to covering up the hatch?

A. Put false hatches on. We was ordered to put those hatches on.

The Court: That is argumentative.

(Testimony of Leroy Ramsby.)

Mr. Jacobson: One more question, your Honor.

Q. (By Mr. Jacobson): Was there anything done in regard to the strongbacks and these flanges?

A. Well, a guy from Willamette Shipyards, I guess he was there. He come down with a torch the next day and a sledge hammer and straightened them out, a repair man.

Mr. Jacobson: Your witness.

Cross Examination

Q. (By Mr. Wood): Mr. Ramsby, is it Ramsby?

A. Ramsby, yes.

Q. Thank you. On this blackboard is supposed to represent the forward starboard corner of the hatch. Do you see that? A. Yes.

Q. Is that where the accident happened?

A. Well, it happened on the forward end or aft just about midships, directly over the shaft alley.

Q. My information was that it happened more in this corner. (Indicating.) A. No.

Q. With the freeboards here and there. It was more here, was it? (Indicating.)

A. It was just midships. Otherwise, when he fell he wouldn't have hit the shaft alley.

Q. He might have been doubled as he went down?

A. I don't think so, maybe one section, something like that, possibly.

Q. Now when you first came there the whole hatch,—the whole [56] 'tweendeck hatch was empty of covers, wasn't it? A. Yes, it was.

Q. And you longshoremen put in the strongbacks? A. Yes, and the covers.

(Testimony of Leroy Ramsby.)

Q. And the covers, and you had some difficulty getting the strongbacks in at first?

A. Yes, we shifted three or four around.

Q. Then after you put them in you put on some of the covers? A. Yes.

Q. Who did that, you and——

A. Well, the whole gang.

Q. The whole gang, and then you and Strand were alone left there?

A. Yes, we were because the other boys went down below to land lumber.

Q. Your intention was to stay there on the 'tweendeck hatch and lift boards up?

A. Yes, we had——

Q. As they were building the bulkhead below?

A. No, they were not building it. They was landing lumber and getting ready to build it, see.

Q. Yes?

A. But we had to cover all of this up with hatch, to leave the center line open to lower tools, in other words, make a place to stand there.

Q. Were you helping Strand pry this board into place? [57]

A. Yes, we was both working together on that.

Q. Did you both have hold of the same lever?

A. Yes, we did.

Q. Were you on the same board? Were you standing on the same board?

A. I couldn't definitely say, but, evidently, we was not because, otherwise, I would have been down there with him, too. I might have been standing par-

(Testimony of Leroy Ramsby.)

tially on it, but it happened so darned quick, you know, I was concentrating on the prying. I couldn't say exactly for sure.

Q. But you were prying on the board that was directly forward of you? A. Yes.

Q. Trying to make it slip down onto the flange?

A. That's right.

Q. Then the board that he was standing on and maybe you were standing partly on it, gave way or fell? A. Yes.

Q. Because it was too long; as I understand it; is that right?

A. I couldn't definitely say it was too long or what, to be truthful about it, but if we thought it was unsafe we probably would not have been on it, but it was something like that, loose someplace, or it wouldn't have fell, I guess.

Q. When did you observe that these beams were sprung?

A. Well, when we came down the hatch and putting the beams in [58] place in the slot, channel thwartship, we noticed it first then, and we noticed it more so after we started putting the covers on.

Q. You had considerable difficulty with the covers from the very beginning, didn't you?

A. Not necessarily, not to start with, but as we worked towards midships we did. It was sprung there, buckled.

Q. That is, as you came nearer to the time of the accident the condition got worse?

(Testimony of Leroy Ramsby.)

A. That's right, it was worse up toward the center.

Q. I have tried to draw a little very crude sketch here of how he was trying to pry that board into place. Does that give you an idea; is that approximately? A. That is something like it, yes.

Q. He was trying to pry the forward board down onto the flange; is that right?

A. Yes, this one here, the forward one, yes.

Q. You were helping him? A. Yes.

Q. I will mark that. I will mark that "Forward" so there won't be any mistake about it. I will offer that in evidence.

(Document, sketch, marked Respondent's 7 for identification.)

Mr. Jacobson: No objection.

Q. (By Mr. Wood): Had you made any protest there against working there before the accident?

A. I was squawking about it or something, but I went ahead [59] anyhow, squawking a little bit about it, but, naturally, you can't tell until you get partially covered up anyhow.

Q. You were squawking about it?

A. Yes, I was kind of squawking and jawing around.

Q. Who were you squawking to?

A. I told the boss, and he said, "Stick them in anyway. Evidently they must go back in," or something, the strongbacks.

Mr. Wood: That is all.

(Testimony of Leroy Ramsby.)

Redirect Examination

Q. (By Mr. Jacobson): Now, you will notice on that sketch that was made by Mr. Wood it shows that as a person standing on a board would be, with the rear portion on top of the plank. Do you notice that? A. Yes, I notice that.

Q. Of the hatch covering. Now at the time of the accident did you, either you or Mr. Strand, know that the board that Mr. Strand was standing on was not actually fitted into the flanges?

A. No, we didn't.

Mr. Wood: Object to that, how does he know whether it was——

Q. (By Mr. Jacobson): Do you know whether or not the board was actually out of place?

A. No, I didn't. Otherwise, I would not be on it.

Q. If that board that Mr. Strand apparently was standing on was on the flanges, would that have come out?

A. If it was down in place [60]

Q. If it had been in place?

A. I don't think so, if it was in place. I don't think so.

Q. Now, if the hatch cover that Mr. Strand was supposed to be standing on, as represented by the exhibit, had fitted down between the strongbacks and on the flanges, even though you and Mr. Strand were prying on another one trying to fit that, would that accident have happened?

Mr. Wood: That is objected to as argumentative.

(Testimony of Leroy Ramsby.)

The Court: Do you want him to decide the case or I? That is all. You don't need to ask him any more questions.

Mr. Jacobson: That is all.

(Witness excused.)

Mr. Jacobson: Call Mr. Olaf Strand. [61]

OLAF N. STRAND,

Libelant, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Jacobson): Where do you reside, Mr. Strand? A. 4834 N. E. 26th Avenue.

Q. And are you married? A. Yes, I am.

Q. What type of work do you follow?

A. Longshoring.

Q. How long have you been a longshoreman, working as a dock worker?

A. Longshoreman, dock worker, I worked about 40 years.

Q. Is that the type of work you have been doing all your life? A. Practically all the time.

Q. How long have you been doing longshore work itself? A. About 25 years.

Q. Now prior to this accident had you been working steady? A. Yes.

Q. How was your health? A. Pretty good.

Q. How old a man are you?

A. Just past 64.

The Court: 64? [62]

(Testimony of Olaf N. Strand.)

Mr. Jacobson: 64.

Q. You lived here how long in Oregon?

A. Lived here in Portland since 1906.

Q. That has been your home ever since you came from the old country? A. That is right.

Q. How long have you been married?

A. 38 years.

Q. Do you have any children?

A. Yes, I have two.

Q. They are now married and have families of their own, I suppose? A. That's right.

Q. Now, Mr. Strand, you were a member, were you not, of a longshore crew that was sent down to work on the Stathes J. Yannaghas berthed down at the Clark-Wilson Dock in Portland; that is correct?

A. That is correct.

Q. You were working with a crew, a longshore crew, on December 12, 1950, on that boat?

A. Yes, I was.

Q. Now what type of work were you asked to do when you got on the boat, you and the crew?

A. We were supposed to line the ship.

Q. Where did you and the crew first go when you got on the boat? [63]

A. We went to No. 3 hatch.

Q. When you got to No. 3 hatch what type of work did you yourself have to do?

A. I have to stay on the 'tweendeck.

Q. Did you have someone working with you?

A. Yes, I have a man.

(Testimony of Olaf N. Strand.)

Q. Is that customary to have two men working on the 'tweendeck when you line the ship?

A. Yes, it is.

Q. What exactly are your duties on the 'tweendeck when the ship is being lined?

A. First thing to cover up so we have a place to work, a place to walk, stand on.

Q. When you say "cover up", do you have reference to putting the hatch covers down?

A. Hatch covers.

Q. Down on the strongbacks on the hold, in the hold; is that it? A. That's right?

Q. Was Mr. Ramsby your partner in this type of work? A. Yes, he was.

Q. Did you and Mr. Ramsby put down the hatch covers on hold No. 3? A. Yes, we did.

Q. Did you have any difficulties there at all?

A. No, we had no trouble. [64]

Q. Did they slide in there all right on the flanges? A. Yes, they worked all right.

Q. Where did you go after you left hold No. 3, you and the gang go?

A. We were ordered to go to No. 4.

Q. Who ordered you to do that?

A. The boss.

Q. Which one was it, Steckel or Pelletier?

A. Steckel.

Q. When you got to No. 4 hold what condition did you find it in, you and the gang find it in?

A. Well, the strongbacks had to be put in first.

Q. Did you assist in putting those in?

(Testimony of Olaf N. Strand.)

A. Yes, we had along there.

Q. Did they go in very easily in place?

A. Not all of them. We had to turn them around and change them around until we got them to fit.

Q. It took some work to get them fixed though that they would fit? A. Yes, that's right.

Q. Do you know whether or not the hatch covers were put there by you and the rest of the crew at that time after the strongbacks were put in?

A. Yes, the whole crew started to cover up. That means put hatch covers on. [65]

Q. Did they continue to do that?

A. They done that until this, what is his name?

Q. McDonald?

A. McDonald, yes, went down in the hold. Then it was for us to cover up the rest of them because we have to land the lumber.

Q. Who was left on the 'tweendecks besides you and Mr. Ramsby?

A. There was Mr. Horseshoes or Hegrenes is really his name. He is nicknamed Horseshoes.

Q. Did he do any of that work covering up?

A. Yes.

Q. After the other members left what type of work did he start doing on the 'tweendeck?

A. Well, he had to go down the hold then because there was only room for two men on the—you have to work partners. You have to pull up the lumber. That's why we have to be two men.

Q. Well, do you know about how heavy these

(Testimony of Olaf N. Strand.)

hatch covers are up around this ship, the Yannaghas?

A. I couldn't say exactly, but I judged around between 60 to 70 pounds.

Q. They are too heavy for one man to handle?

A. Yes, they are too heavy for one man to handle.

Q. Because of the weight or because of the size?

A. Both.

Q. Then you and Mr. Ramsby were left the job of putting on the balance of the hatch covers; is that correct? [66] A. That is correct.

Q. Then what did you do? Tell the Court exactly how you proceeded about the job there.

A. Well, we started to put on along the hatch coaming, first one and then another one, and we put down a whole tier. Then we start on the next tier.

Q. Did you have any difficulty when you first started?

A. We didn't seem to have any difficulty closing the hatch coaming until we got further out on the hatch.

Q. Where did you get these hatch covers? Where were they?

A. They were forward on the 'tweendeck.

Q. Were they all on a pile?

A. They were, yes, they were all on the pile.

Q. You would pick one up, bring it over to the hold, put it down in place? A. That's right.

Q. And the customary way of putting those down is to put one down, then take another one, put that

(Testimony of Olaf N. Strand.)

other down before stepping on the one that you had put down?

A. Yes, we put it right on the end of the one we had put down to finish the tier, yes.

Q. You stepped on the one that you put down, and you put another one down, and you stepped on the second one when you put the third one down; is that correct? A. Yes, that's right. [67]

Q. Will you point out, if you can, approximately where you were in putting down these various hatch covers in relation to the hold when you found yourself with the hatch cover that wouldn't fit?

A. We were very close to the middle of the ship, of the bulkhead.

Q. Very close to the middle of the hold?

A. Yes.

Q. You don't recall the exact location, do you?

A. I can't recall that exactly, the tier we put in there, but it was very close to the middle.

Q. Now, what happened when you have got a hatch cover that wouldn't fit into the flanges, between the flanges of the strongbacks? Tell the Court what you did.

A. Well, we went to get a 2 by 4 to pry it because it was so little, that part of the strongback that we could get this to go in.

Q. The others went in very easily. How come that this did not go in?

A. Well, the flange on the strongback was bent.

Q. Was there anything else the matter with the strongback there?

(Testimony of Olaf N. Strand.)

A. Yes, the strongback was bent itself.

Q. Is that the normal way these strongbacks are supposed to be on these ships?

A. No, they are supposed to be straight.

Q. Now do you recall who went after the 2 by 4?

A. I can't recall. It was one of us.

Q. Tell the Court exactly what you did in relation to that hatch cover that was not able to fit. What did you try to do?

A. We tried to put a 2 by 4 in between the hatch cover and the strongback so we could pry a little bit so the strongback would give a little bit so the hatch would go down.

Q. Now when you were doing that did you step on the hatch cover—where were you standing in there? A. I was standing on another hatch.

Q. Was that in back of the hatch cover you were trying to put in place? A. Yes.

Q. Do you know whether or not you or Mr. Ramsby put that particular hatch cover that you were standing on down? A. No.

Q. Did you put it down yourself?

A. No, I didn't. Lots of the others put down hatch covers there.

Q. Was that one of the hatch covers that were put down there by the gang? A. Yes.

Q. Did you notice whether or not the hatch cover was partly in the flange and the back of it was on top of the flange? A. I didn't notice.

Q. Did you yourself try to pry that front hatch cover into place?

(Testimony of Olaf N. Strand.)

A. Yes, we tried to pry it in. [69]

Q. Was it you yourself, or was Mr. Ramsby helping you? A. We both worked on it.

Q. What happened?

A. Well then, the hatch slipped out from my feet, and I went down, and that's all I remember.

Q. Do you recall what you hit? A. No.

Q. When you landed down in the hold were you conscious? A. No.

Q. When did you first know what happened to you?

A. I first come to when I was on the dock laying in the stretcher.

Q. Now where were you; do you know where you were taken from the dock?

A. Yes, I was taken to St. Vincent's Hospital.

Q. How long were you at the hospital; how long were you there? A. About three weeks.

Q. Who was your doctor attending you at that time? A. Dr. Howard Cherry.

Q. Can you tell me what injuries you sustained as a result of this fall? A. I don't know——?

Q. What damage did you get as a result of the falling down into the hold, on your body?

A. I hurt my back.

Q. Is that the only thing that happened to you?

A. Well, I cut my lip practically in two, and my eye was just about closed up when I come to the hospital.

Q. Did you have anything the matter with your mouth? A. Yes, I have.

(Testimony of Olaf N. Strand.)

Q. How is that? A. Yes, I have.

Q. What was the matter with your mouth at the time of the accident? A. Well, the lip was cut.

Q. How about the inside of your mouth?

A. The inside had to be sewed.

Q. It was cut?

A. Yes, it was cut right across; it was tore.

Q. What about your teeth?

A. It was tore off, tore.

Q. What about your teeth?

A. Tore out, the pair was tore out.

Q. Are those false teeth that you have?

A. Yes, I have a plate.

Q. And those plates have been repaired; is that correct? A. Yes, they was repaired again.

Q. What about your side? Did you get any injuries on your arm or the side of your body?

A. Well, I had a blue spot on the hip on the left side.

Q. Anything with your arms? [71]

A. Yes, couple of cuts on the arms, pretty deep.

Q. Now you referred to the fact that you had a bruise on the arm. Is your leg bothering you now?

A. My left leg is bothering me, yes.

Q. What is the matter with it?

A. It seems I don't have any strength in it. It is weak. It takes the knee a little bit.

Q. What about your back? What is the matter with your back?

A. Oh, the back seems like I haven't got no strength to pick up anything. It is stiff.

(Testimony of Olaf N. Strand.)

Q. Have you been ordered to wear any appliance on your back?

A. Yes, I wear a brace all the time.

Q. Now what about your lip? You say it was cut? Now, have you got a scar on it now?

A. No, I haven't got control over it.

Q. Well, I say, have you got a scar?

A. Yes, I got a scar.

Q. Turn around and let the Judge see it.

A. It shows, I guess.

Q. Now what about the lip? How does it feel when you are eating?

A. Seems like I haven't got no control over it. I got to watch myself when I eat so that the food don't slip out. It's hard, you know.

Q. Was that lip sewed up?

A. Yes, it was sewed up. [72]

Q. Do you know how many stitches they took on that? A. No, I couldn't say.

Q. How have you felt? How has your nervous condition been?

A. Well, it makes me a little nervous at times.

The Court: Does he work?

Q. (By Mr. Jacobson): Have you been working since the accident? A. No, I haven't.

The Court: Have you tried to?

The Witness: The doctor ordered me about a month ago to try, but I didn't feel, I didn't, I didn't feel I had the strength.

Q. (By Mr. Jacobson): The doctor talked to you about a month ago to try to go to work; is that right? A. Yes, that is right.

(Testimony of Olaf N. Strand.)

The Court: What kind of work did the doctor suggest you try, longshoreman?

The Witness: Longshoreman.

Q. (By Mr. Jacobson): Have you been having any nosebleeds?

A. Yes, I have lots of nosebleeds on this side where I was hurt. I also hurt, in fact, I still got a lump there on the nose from the blow when I struck and went down.

Q. Did you have much pain at the time you were brought into the hospital? A. Oh, yes.

Q. Now what did they do to you up at the hospital?

A. Well, they didn't do nothing else than they sewed up my lip [73] first night and put to bed because the doctor said I wasn't in condition to be moved too much so he put me to bed. He put a board underneath the mattress so I was going to lay straight.

Q. You were lying on a board under the mattress? A. Yes.

Q. Do you know whether they took any pictures of you? A. Took pictures the next day.

Q. Did they put any stitches in your mouth?

A. Yes, they put that in the first night when I come up to the hospital.

Q. Now how did you feel at the time you were in the hospital lying on that board?

A. Well, I couldn't move. I had to lay there. I had to be fed like a baby. I couldn't do nothing except I laid there, that's all.

Q. Did you have any pain? A. Yes.

(Testimony of Olaf N. Strand.)

The Court: Does he have pain now?

The Witness: Yes, I have pain. Yes, I have pain in my back. My back is sore, you know.

Q. (By Mr. Jacobson): What about your leg? Have you any pain in your leg when you are walking?

A. Yes, it catch me every now and then when I walk, set right in, one leg to the, to another.

The Court: How was his leg hurt? [74]

Mr. Jacobson: He hit the shaft alley, apparently. I don't know, but he must have.

The Court: Where was he hurt on his leg?

Q. (By Mr. Jacobson): Where were you hurt, what part of the body in relation to the leg?

A. Mostly on the hip, on this (indicating).

Q. Is that the left leg? A. Left leg, yes.

The Court: Does he have trouble walking now?

The Witness: Yes, I have trouble walking now, yes, I limp, and before I know it it kind of comes over all at once.

Q. (By Mr. Jacobson): Have you tried to do some work, say, around the house?

A. I have done a little bit, just a little bit around the yard, and that's all.

Q. Now have you tried to bend over and do some light work, bending over to pick up grass, anything like that?

A. Well, I have tried to be very careful because I simply get awful headaches when I do bend over.

Q. But you have tried to do that type of work?

A. I have tried, yes.

(Testimony of Olaf N. Strand.)

The Court: What is this about headaches? What did you say about headaches?

Q. (By Mr. Jacobson): Do you have any headaches?

A. I used to have lots of headaches. [75]

Q. Did you have them before this accident?

A. How is that?

Q. Did you have them before this accident?

A. No.

The Court: He spoke of his eyes. Has his vision been affected?

Q. (By Mr. Jacobson): How about your eyes, are they any different now than they were before the accident?

A. No, I don't know, I couldn't tell. I haven't asked the doctor. I can see all right.

Q. You haven't any difficulty seeing now? Do you have any difficulty in seeing with your eyes now?

A. I have to use glasses when I read, of course.

The Court: Let Mr. Wood cross examine, and you can take up anything you have forgotten. Cross examine, Mr. Wood.

Cross Examination

Q. (By Mr. Wood): Mr. Strand, you said you have not done any work since the accident, and that leaves me to think of how you support yourself. Are you receiving compensation?

A. No, I ain't.

Q. From the insurance carrier? A. No.

Q. As a stevedore?

(Testimony of Olaf N. Strand.)

A. I don't receive anything. [76]

Q. How? A. I haven't received anything.

Q. I want to get clear in my mind, where you start to cover up that hatching. May I go up there to the blackboard? Now on this blackboard, which I believe your lawyer drew, this represents the hatch. This is forward? A. Yes.

Q. That is aft? (Indicating.)

A. That's right.

Q. This is the 'tweendeck hatch. Now I will rub these out because I drew those myself. Now as I understand your testimony, part of your gang, or maybe all of it, after you put the strongbacks in place began to cover up the hatch?

A. That's right.

Q. That's right. Now how many men worked at that in the beginning? In other words, there was more than just you and Ramsby, wasn't there?

A. Yes, that is seven me.

Q. They began to do the covering up, did they?

A. Yes.

Q. What part of your hatch did they begin on?

A. They started along the coaming first. They have to.

Q. Now forward or aft?

A. Well, it's forward; the hatches is forward.

Q. In other words, the gang began to cover up the forward end? [77] A. Yes.

Q. It is customary—I think I know—to cover a tier at a time, usually, isn't it? A. Yes.

Q. No?

(Testimony of Olaf N. Strand.)

A. It is customary to cover this way. (indicating.)

Q. This way, fore and aft?

A. Fore and aft.

Q. Is that what you did? A. Yes.

Q. Was that done on this occasion?

A. Yes.

Q. All right.

The Court: Put an arrow to show the way they worked.

Mr. Wood: Yes, I will.

Q. Where did they begin, forward or aft?

A. They would begin forward.

Q. They would begin forward, and they worked that way, in that direction? (Indicating.)

A. That's right.

Q. Now what was the condition of the hatch? I mean, how much of it had been covered?

A. There hadn't been any covered when we come down.

Q. When you first began, I know.

A. Yes. [78]

Q. But when you and Ramsby were left there alone how much of the hatch was covered?

A. Oh, I will say——

Q. (Interrupting): Which part? I am going to draw it as you tell me.

A. Well, they were covered. There was some laid here on both sides.

Q. You had begun here? (Indicating on blackboard.) A. Yes.

(Testimony of Olaf N. Strand.)

Q. That was covered, and this was covered, the second tier? A. Yes, that's right.

Q. And the third tier? A. Yes.

Q. All the way back?

A. All the way back.

Q. Clear back the whole length of the hatch?

A. Yes.

The Court: That is what he calls coaming?

Q. (By Mr. Wood): This is a coaming, is it not, all the way around? A. That's right.

Q. I mean, the outside edge of the hatch is the coaming?

A. That's the coaming, boards and the coaming.

Q. It is fitted with a flange on which the boards rest; is it not? [79] A. No.

Q. The forward and aft has to have a flange on it?

A. Yes, the fore and aft, but not a coaming.

Q. The fore and aft has a flange to lock the flange on the strongbacks? A. That's right.

Q. Now I just want you to tell me to draw as much as you covered here when you and Ramsby took charge and worked alone. Go ahead. Shall I draw on the board here? A. Yes.

Q. All the way back? A. Yes.

The Court: How wide are they?

Q. (By Mr. Wood): They are about two feet wide, aren't they?

A. Well, they are something like that.

Q. 18 inches, two feet wide. I thought they were usually two 12 inch boards fastened together with

(Testimony of Olaf N. Strand.)

that band. A. Wider than that.

Q. It would be about two feet wide?

A. Well, I would say three.

Q. Three feet wide, all right. Well now, shall I draw another line on this?

A. Yes, you can do that.

Q. I mean, before you and Ramsby were left alone was another line of covers laid down by the whole gang? [80] A. Yes.

Q. All right, and still another? A. Yes.

Q. I want to get the condition of the hatch when you and Ramsby were there alone.

A. Well, that is close to the middle of the board.

Q. All right, I will draw another. (Draws on blackboard.) Something like that?

A. Something like that.

The Court: How far across, half way?

Q. (By Mr. Wood): Well, nearly half way across the hatch? A. Yes, sir.

Q. Your intention was to leave an open space in here, wasn't it? (Indicating.)

A. In the middle, yes.

Q. Which you could raise and lower boards?

A. Yes.

Q. Now all this covering up had been done by you and Ramsby and two or three other longshoremen; is that right?

A. Seven of us altogether when we started in.

Q. All right then, why did the other men leave and leave you two alone?

A. For one reason, they have to land lumber on

(Testimony of Olaf N. Strand.)

the load. There have to be somebody down there.

Q. Was there any other reason? [81]

A. And the other reason is that this man have to fasten, the hatches didn't fit in.

Q. Who is that, McDonald?

A. McDonald, yes.

Q. In other words, he refused to work there any more? A. Yes, he went down below.

Q. Did you hear that protest? A. Yes.

Q. Did you hear the walking boss say, "Well, the boards came out of there. They must go back in again?" A. That's what he said, yes.

Q. So you remained there and worked?

A. Yes.

Q. Your answer is "Yes"?

A. Got orders to stay there, yes.

Q. Well, did you think that McDonald's protest was right? A. I think so.

Q. I mean, at that time did you think so?

A. Yes.

Q. That there was something wrong with the hatch?

A. There was something wrong with the beams.

Q. You didn't think they were safe?

A. No.

Q. You didn't think so, did you?

A. I didn't think they were safe. [82]

Q. No. Now, why didn't you do as McDonald did and go some place else?

A. There was no other place but to go through there.

(Testimony of Olaf N. Strand.)

Q. Now this is known as the No. 1 tier, isn't it, the forward tier? They are numbered 1, 2, 3, 4? Don't they call them like that?

A. They are supposed to be.

Q. Well, we will call those for the purpose of showing up what we are talking about. We will call the forward tier No. 1, the next one to it No. 2. Now were you standing on a board in No. 2 tier when you fell?

A. I can't recall that. I think it was further in the middle than that.

Q. Well——

A. Something like that, 3.

The Court: How did they face as they worked?

Mr. Wood: The men, you mean?

The Court: Yes, like you are facing?

Q. (By Mr. Wood): Now at the time of the accident you were standing, I believe, like this, prying forward, weren't you?

The Court: Yes, well, I mean, did they face fore and aft?

The Witness: Faced fore and aft, your Honor.

Q. (By Mr. Wood): But you were facing forward at the time you were prying. In other words, there was a board here in, we will say, No. 2 tier, which was too long to fit even, wasn't it, and [83] that board you were trying to pry into place, and in so doing, why, you stood on the board, next board to it, didn't you? A. Yes.

Q. Did you look at all to see whether that board you were standing on was fitting on the flanges?

(Testimony of Olaf N. Strand.)

A. No, I didn't notice.

Q. You did not look, did you?

A. Well, we couldn't work it over; that is all. I figured it was safe.

Q. What do you think made the board fall?

A. I couldn't say. It seemed to be under my feet.

Q. What explanation can you make of it now?

A. The only way I can say is it must have been up on one end.

Q. That is what I think, too.

A. If it was right in between, I don't see how it could go out.

Q. No. It probably was up on the after end. If it had been up on the forward end, you would have seen it. In fact, if it had been up on the forward end, you couldn't have pried against it, could you? Is that right? A. No.

Q. I would like to show you just a little rough sketch—I am not much of a draftsman.

The Court: Don't let him mislead you. He is an artist. He is a good drawer. [84]

Q. (By Mr. Wood): Is that about the way it was? You don't know whether it was up on one end or not?

A. That looks something like it, yes. Prying the hatch here (indicating)——

Q. If this forward end of this board had been up over the vertical flange, you would have seen it, wouldn't you?

A. Couldn't help it; you had to see it.

(Testimony of Olaf N. Strand.)

Q. So, if the board gave way, it looks as if it must have been the after end that was too high up, is that right? A. Yes, sir, the way it looks.

The Court: Too high up, why?

A. If the hatch is put in, one end would be on top of the flange.

Q. (By Mr. Wood): Anyway, you did not look to see what condition it was in? A. No.

Q. You not only did not notice it; you did not look to see what condition it was in before you stepped?

A. You look practically every step you take when you work in that line of work, because you have to, because it is too dangerous.

Q. But you did not look to see how this board was, did you? A. I didn't notice that.

Q. If you had noticed it, what would you have done? A. I wouldn't have stepped on it. [85]

Q. Had you had trouble putting in the other hatch covers before this one, or had they gone in nicely? A. Not always, on different ships.

Q. No. I mean on this ship, on this hatch.

A. No, in No. 3 they went in all right.

Q. How about on No. 4, the one we are talking about?

A. They went in all right until we got up there on this particular hatch, and then it was too long.

Q. This particular one?

A. But we were going to try it, anyway.

Q. Before that you had had no trouble?

A. No, we got them in there.

(Testimony of Olaf N. Strand.)

Q. Although you had seen these beams were bent, nevertheless they went in all right, did they?

A. Yes.

Mr. Wood: That is all.

Redirect Examination

Q. (By Mr. Jacobson): At the time of the accident how much were you earning on an average a month? A. At the time of the accident?

Q. Yes, how much a month?

A. Around $400 a month.

Q. What were your average earnings during the year 1950 up to [86] the time of the accident?

A. You mean earnings for the whole 1950?

Q. Yes, average earnings for each month?

The Court: He said $400.

Mr. Jacobson: At that time; I mean for the whole year.

The Court: He meant an average of $400 a month.

Q. (By Mr. Jacobson): For the year 1950?

A. Yes, I think I did; yes.

Q. Did you do any other work besides longshoring sometimes?

A. Yes, I worked—used to go to Alaska.

Q. When did you go to Alaska?

A. I went to Alaska in 1948.

Q. What time of the year would you be going?

A. Generally left—it would be around June.

Q. And you would be gone for how long?

A. About five weeks, between five and six weeks.

Q. What would you be doing up there?

(Testimony of Olaf N. Strand.)

A. Fishing.

Q. What type of earnings would you earn on that type of work?

A. It all depends on the season.

Q. Let the Court know your approximately earnings for 1948. A. About $2,000.

Q. For five weeks? A. Five weeks, yes.

Q. Did you contemplate going to Alaska, prior to the accident, [87] in the year 1950 or 1951?

A. I couldn't go this year. I had a chance to go, but I couldn't go. I couldn't take a chance.

Q. Do you feel you can go back to longshoring in your present condition?

A. I am afraid not.

Q. Why not?

A. Well, for the simple reason I don't think—couldn't lift anything, any weight.

Q. You have to lift heavy weights in longshoring? A. Yes.

The Court: Q. What other kind of work can you do, do you think, if you can't go back to longshorting?

A. I wouldn't know what kind of work I could do.

Q. What other kind have you ever done in times past?

A. That is all. I have been working on the Portland waterfront.

Q. Twenty-five years? A. Yes.

Mr. Jacobson: That will be all.

(Testimony of Olaf N. Strand.)

Recross Examination

Q. (By Mr. Wood): Do you think the board was too long or too short?

A. Couldn't exactly say. All I know, it slipped out.

Mr. Wood: That is all. [88]

Mr. Jacobson: That is all.

(Witness excused.)

Mr. Jacobson: Does your Honor wish to continue?

The Court: Do you have other witnesses?

Mr. Jacobson: One more witness, Mr. Strand's wife.

The Court: What do you want her for?

Mr. Jacobson: And the doctor. We told the doctor we would have him at 1:30 this afternoon.

The Court: You had better consult me about these dates you make with doctors. I am just as busy as they are.

Mr. Jacobson: I did not realize your Honor wanted to go through the noon hour.

The Court: How many witnesses do you have, Mr. Wood?

Mr. Wood: Two, your Honor. We have a deposition and possibly a doctor, depending on what their doctor says.

The Court: Bring me the deposition. I will read it during the noon hour.

(Court thereupon recessed until 1:30 o'clock p.m.) [89]

Court reconvened at 1:30 o'clock p.m. June 15, 1951, pursuant to recess.

DR. HOWARD L. CHERRY

was produced as a witness on behalf of Libelant and, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Jacobson): Dr. Cherry, you are a physician and surgeon authorized——

Mr. Wood: We will admit his qualifications.

Mr. Jacobson: Does your Honor wish to know the Doctor's qualifications?

The Court: He looks all right to me.

Mr. Jacobson: Q. How long have you been practicing medicine, Doctor?

A. I graduated in 1943.

Q. Are you specializing in any branch of medicine? A. Yes, sir.

Q. What is the branch you are specializing in?

A. Orthopedic surgery.

Q. Do you know Mr. Strand here?

A. Yes.

Q. Where did you first meet Mr. Strand?

A. I first saw him at St. Vincent's Hospital immediately after an injury. [90]

Q. Do you recall when you saw him?

A. It was December 12, 1950.

Q. Did you examine him at that time?

A. I did.

Q. Did you take any X-rays?

A. He had X-rays the next day, as I recall.

(Testimony of Dr. Howard L. Cherry.)

Q. What condition did you find him in the first time you went to the hospital?

A. I saw this man in the emergency room. He had severe lacerations to the mouth and had severe, apparently severe, pain in his back.

Q. Did you prescribe anything for him to relieve his pain?

A. Yes, he was given a hypodermic.

Q. What about the type of bed he was placed on, do you recall? A. I can't say for sure.

Q. Have you any findings in regard to the examination you made of him at the time of the first examination and subsequent to the time you saw him in the hospital?

A. Yes. When I first saw him the most obvious things were these lacerations. His lower lip was split completely through and about a third or half of it was hanging off. Also, his dental plate had been broken and it had cut his upper gums; lacerations about an inch long, and there was a third laceration about an inch long on his chin. These were repaired very soon after he came to the hospital. [91]

Then his other injury was in regard to his back. He was very sore and tender and in practically a spasm at the time I saw him.

Q. Any lacerations on the roof of his mouth?

A. In the region of his gum, the upper gum.

Q. Did you find any bruises or contusions on the left side of his body or left arm?

A. I don't recall whether I did or not.

(Testimony of Dr. Howard L. Cherry.)

Q. You have been his attending physician ever since the accident; is that correct?

A. I have, yes.

Q. How long did you have him in the hospital?

A. He was in the hospital from December 12th until December 30th, 1950.

Q. What treatment did you prescribe for him after he left the hospital, Doctor?

A. He was given physiotherapy from Dr. Arthur Jones' laboratory, and he was given a reinforcing brace for his back.

Q. Is it necessary, in your opinion, that he wear a brace for his back at the present time?

A. Yes. To the best of my knowledge, he is wearing it.

Q. When is the last time, or when was the last time you examined him?

A. I examined him on June 11, 1951.

Q. Before we get to that examination, you did take X-rays of [92] Mr. Strand, is that correct?

A. Yes.

Q. What did they reveal to you, Doctor?

A. The main findings at the time of his injury—there were no fractures, no bony injuries that we could detect at the time of his injury. He had, however, a marked narrowing of the lumbosacral joint with sclerosis and an irritation apparent at the lumbosacral joint.

Q. What did you find at this last examination? What condition did you find him in at that time?

A. On the last examination his back was still

(Testimony of Dr. Howard L. Cherry.)

sore. He has limitation of motion in his back so he is unable to reach normal range; he still has back spasms and is tender. His lip is healed, but there is considerable scar tissue in this region.

The Court: Q. What is the type of back spasm that he has now?

A. It is due to chronic back strain.

The Court: Q. Does his history show he had it before?

A. I don't know of any trouble with his back.

The Court: Q. When you say "chronic" you mean you regard it as chronic now?

A. After this length of time I would, yes.

Mr. Jacobson: Q. Has he made any complaint to you about his left leg? Has he made any complaint to you about his left leg bothering him? [93]

A. Yes. He is complaining of pain in the leg and especially centered around the knee.

Q. What are your findings in regard to this complaint?

A. His knee was X-rayed and no changes were noted. It is my feeling that the pain he has in his left lower extremity is due to his back injury. The nerves to the extremity merge at the level of his back where it was hurt and that is a common cause of pain in the leg.

Q. Will his present back condition be permanent, in your opinion?

A. I think there is great likelihood that he will continue to have disability in his back.

Q. In your opinion will he be able to follow the

(Testimony of Dr. Howard L. Cherry.)

line of work that he did prior to the accident?

A. I don't believe he will be able to do heavy manual labor.

Q. Would Mr. Strand require continuous treatment to his back in order to be relieved of any pain or suffering?

A. I doubt that he will need prolonged treatment. I think primarily he will have to stay within the limits of what his back will stand.

Q. Do you think there is anything that can be done for him at the present time in order to relieve that condition? A. I think not.

The Court: Q. He testified about headaches that he says he still has. Do you know anything about that?

A. I have not treated him for headaches. [94]

Mr. Jacobson: Q. Has he complained to you about the fact that he has some nosebleeds when he bends over?

A. I was unaware that he had nosebleeds.

Mr. Jacobson: That is all.

Cross Examination

Q. (By Mr. Wood): Did this man come to you because your office does work for Jones Stevedore Compensation Carrier?

A. Our group does do work for the Jones group, yes.

Q. And it was in that capacity you were attending this man? A. Yes.

Q. Any medical bills of yours would be paid by Jones or by its insurance carrier, wouldn't they?

(Testimony of Dr. Howard L. Cherry.)

A. Either that—they are paid by the insurance carrier normally, yes.

Q. I presume you know Dr. Theodore Pasquesi?

A. I do.

Q. We had Dr. Pasquesi examine this gentleman in January. I have a two-page report here. I will be glad to show it to you. The substance of the report is that he could not find any fractures as you have said, but he did find some moderate arthritic lipping, and he thought the man would be able to resume work in about three months from January. Do you differ with that opinion? [95]

A. In January, I agreed with him.

Q. Did you and Dr. Pasquesi consult about the matter?

A. No, I was unaware Dr. Pasquesi—what I mean by that is that in January I thought he would be able to work in three months. I was unaware that Dr. Pasquesi had seen this man.

Q. What has changed your opinion, if it has changed?

A. My opinion has changed in that he has not made as good a recovery as I thought he would attain.

Q. How do you tell that? You cannot tell that from any X-rays or objective finding, can you?

A. You can't tell it by X-rays, that is correct. You can by examining him and finding tenderness, spasms and lack of motion.

The Court: Q. His age is a factor. He said he is sixty-four.

(Testimony of Dr. Howard L. Cherry.)

A. His age is a factor, certainly.

Mr. Wood: Q. You said that his back is in more or less a chronic condition. Do you know whether that is due to the accident or to conditions existing either before or possibly his advanced age?

A. Could I have those questions one at a time, please?

Q. Can you attribute this chronic condition to the accident?

A. The accident brought about the acute stage which has gone into a chronic back strain. The accident did not cause the changes shown in the X-rays. Those were there previously, but to the best of my knowledge he did not have trouble with his [96] back before and he was able to perform rather hard work, and since his accident he has had constant trouble and it has become chronic. By chronic I mean of long standing, and it has not changed very much. I feel the accident did contribute to his chronic back pain.

Q. Aggravated it, is that what you mean?

A. If he did not have the pain before, I can hardly use the word "aggravated" for his pain now. It aggravated the changes that are shown by the X-rays.

Q. You do not mean that this man is incapacitated from doing such work as would enable him to earn his living, do you?

A. I hardly think that this man will be able to return to longshoring, to earn a living in the usual occupation of longshoreman, the usual occupation that longshoremen pursue.

(Testimony of Dr. Howard L. Cherry.)

Q. I don't know how familiar you are with longshoring. You are a comparatively young man, compared to me, anyway. Do you know that there are a good many jobs in connection with longshoring, for example, hatch tender, hatch boss, winch driver, and so forth, which do not require any particular physical labor?

A. That is why I said that this man could not return to hard labor. He might be able to perform lighter jobs.

Q. Are you familiar sufficiently with longshore work to know that these jobs I mentioned, like that of hatch tender, which is merely giving signals, and hatch boss, which is bossing the [97] gang, and winch driver which is merely moving levers—are you familiar with the fact that those do not require hard labor? A. Pardon?

Q. Are you familiar yourself with the fact that those particular jobs do not require any hard labor?

A. I know that. I have become aware of that.

Q. If there is no fracture, no compression fracture—as far as I can make out, there is nothing but arthritis. Maybe I am wrong—to what do you attribute this pain that you now assign to the accident?

A. It is a condition which I term a low back sprain. It is certainly contributed by his arthritis, and since he had previously, as he said, a normal amount of motion and he has had a tearing of the ligaments——

Q. He has had what?

(Testimony of Dr. Howard L. Cherry.)

A. A tearing of ligaments; probably a tearing of muscle fibers in that region; and any person that has had that type of back he has, some get well, some keep going.

Q. I think we all know and agree that Nature is a great repairer, isn't she? That is true, isn't it?

A. In cases, yes.

Q. Don't you think Nature will continue to work an improvement in this man?

A. A man sixty-four years old, with marked loss of space in that joint, if he sticks to hard labor I would expect him to [98] continue to have a sore back.

Q. You are not very encouraging to me, I am afraid.

A. You are not doing longshoring.

Mr. Wood: That is all I have, your Honor. Instead of calling Dr. Pasquesi, I would like to offer this report in evidence which really does not differ from what Dr. Cherry says his opinion was last January.

Redirect Examination

Q. (By Mr. Jacobson): Irrespective of the fact you were paid the cost of your services, what is the reasonable value of your services and of the X-rays, for the record?

A. Our services run $200 for treatment performed and $30 for X-rays.

Mr. Jacobson: That is all. Thank you.

(Witness excused.)

Portland, Oregon, June 19, 1951, a.m.

Court reconvened in the above-entitled cause, pursuant to adjournment.

DR. THEODORE J. PASQUESI

was thereupon produced as a witness on behalf of Respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wood): Dr. Pasquesi, did you examine Mr. Strand? A. Yes.

Q. You examined Mr. Strand, I believe, last January, and made a report? A. Yes, I did.

Q. That report has been introduced in evidence here so we do not need to go over that. The substance of it was that you found him disabled at that time to the extent of about three months. That was your conclusion? A. That is right.

Q. Since that time, at my request you have examined him again, have you? A. I did.

Q. Just the other day?

A. I examined him last Friday.

Q. Will you please tell the Court what you found his condition [100] to be? Just tell the Court rather than the attorneys. The Court is the one that is interested.

A. Yes. Mr. Strand was examined last Friday afternoon, and it was noted that he was not so active this time as he was on the previous occasion in January, January 26th. He said his troubles at this time were that his back was weak, that he had pain in his back when he reached down to pick up ob-

(Testimony of Dr. Theodore J. Pasquesi.)

jects from the floor, and that he did not seem to have much strength. He said when he was stooping over he complained of getting headaches and being dizzy, as well as his back causing him pain. He further stated at that time that when he was out for a walk he would walk a block or two and he would have to stop and would get cramps in his leg and that he had to stop and start again. They would be relieved after stopping for a short time.

He also complained at that time that he still had some pain in the region of his left knee. He said that these pains in his leg and these cramping leg pains had come about mostly in the past month.

When we stripped the man for examination it was found he wore an orthopedic belt which he said he had been wearing for about a month. He said he had been doing some work around his yard and that he stiffened up considerably and had headaches.

The Court: Did he say anything about nose-bleed? [101]

A. He hadn't said anything to me about bleeding of the nose. Do you want me to go on with the examination?

Mr. Wood: Yes.

A. In view of the fact that he complained of this dizziness and cramping of his legs, a further examination was done which was not done on the first examination in January, when first seen by me. It was found he had an ecchymosis, with blood pressure of 200 over 96; that his pulse was 120; that it was not entirely regular and that some of the

(Testimony of Dr. Theodore J. Pasquesi.)

pulse beats were not felt. As far as the feet were concerned, it was found a tibial pulse, the pulse inside the ankle—they were both quite markedly diminished. His skin was quite dry, and a kind of a dusky purple color.

I interpret the ecchymosis to mean that, besides the other troubles, the man had quite a hypertension and that the cramping in his legs was due to inadequate blood supply.

As far as his back was concerned, it was found he was able to bend over fairly well, no deformity in the back, although he complained of some pain on straightening up. He was rather stiff. No muscle spasm was evidenced.

The examination showed also that he had some limitation of the motion of the hips but no greater than at the first examination.

On listening to his heart it was found that it was quite loud and seemed to cover most of the chest.

Q. That completes your description of the examination, Doctor? A. Yes.

Q. What is your opinion as to his disability at the present time, if any, whether it arises from the accident or from the hypertension, or what?

A. My opinion is that his disability is from both.

Q. Either?

A. His disability at the present time is a result of both the hypertension and he has not recovered completely from his back injury at the time of his accident.

Q. Is it possible to apportion the consequence

(Testimony of Dr. Theodore J. Pasquesi.)

of the blood pressure, the hypertension, and the accident and say that so much of his present condition is due to one and so much to the other?

A. It is very difficult to evaluate it in that sense. However, I do feel the most serious disability here is due to his blood pressure.

Q. Dr. Cherry testified the other day, if I recall his testimony, that he thought Mr. Strand's condition resulting from his fall had reached a stationary stage and that there would be no further improvement. What have you to say about that?

A. It has been six months since the man's accident. I do not think any case at six months can be considered stationary.

Q. Would you anticipate some further improvement in his back?

A. I thought he had improved some in his back. In the two [103] examinations I made the man was more pliable this time than he was before. However, it is rather difficult to evaluate this type of thing to a specific degree because most of the complaints are symptomatic; they are not objective.

The Court: You have his age there?

A. Sixty-three, yes.

Mr. Wood: That is all.

Mr. Jacobson: No questions.

(Witness excused.) [104]

Portland, Oregon, Monday, October 1, 1951

Court reconvened in the above-entitled cause, pursuant to adjournment.

Appearances: Mr. Leo Levenson, of Proctors for

Libelant; Mr. Lofton L. Tatum and Mr. Erskine B. Wood (Wood, Matthiessen & Wood), of Proctors for Respondent.

Mr. Tatum: The Court realizes, of course, the handicap under which Mr. Wood and I appear today. It is our understanding that this is the time set for hearing further medical testimony. I was informed that libelant's proctors were agreeing that there was no connection between the hypertension and the injuries received. I later talked to Mr. Jacobson and he informed me that is not correct.

The Court: Yes.

Mr. Tatum: We have brought Dr. Pasquesi to court today. We have examined the testimony of the doctors at the previous hearing and we find there is no direct testimony one way or the other connecting hypertension to the injuries. We have brought Dr. Pasquesi to court to testify directly upon that point. [105]

DR. THEODORE J. PASQUESI

was thereupon recalled as a witness on behalf of Respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Tatum): Dr. Pasquesi, you testified previously in this proceeding on June 19, 1951. At that time you reported on an examination made of Mr. Strand in January of 1951 and also an examination which you made a few days prior to the trial.

In your testimony you related a finding of blood

(Testimony of Dr. Theodore J. Pasquesi.)

pressure of 200 over 91, pulse 120, as showing a condition of hypertension.

I will ask you in your opinion whether or not this hypertension is connected with the injury which Mr. Strand related to you in his history?

A. In my examination of this man on two different occasions it was my definite opinion there was no connection between the two.

Q. What medical evidence do you rely upon in arriving at that opinion?

A. Well, there are two major causes for blood pressure rising. One of them is due to a weakness in the heart itself, which is a pump, perhaps one or more valves leaking and, therefore, like a leak in any mechanical structure, more effort would have to be put out to get the same kind of an output. [106]

Secondly, as everyone advances in age, the elasticity of the vessels becomes less and less; in other words, they become harder and harder. The term used is arteriosclerosis, which is a relative term, and which everyone has as he gets older, increasing with age. With less elasticity it is necessary for the heart, which is the pump, to work harder to push the blood around to all of these points.

The measure of the amount of energy, in millimeters, that it takes the heart to push the blood around is a blood pressure reading.

On examining Mr. Strand's heart there did not seem to be any valvular leakage. The heart seemed enlarged, as it naturally would be. The heart had to

(Testimony of Dr. Theodore J. Pasquesi.)

put out that much more work over a long period of time.

Q. What is your conclusion as to which of these two reasons was the reason for Mr. Strand's high blood pressure? A. Arteriosclerosis.

Q. In your opinion, is there any connection between trauma, or an injury, the kind Mr. Strand sustained, and hardening of the arteries?

A. No, I don't believe there is any connection.

Mr. Tatum: [107] That is all.

Cross Examination

Q. (By Mr. Jacobson): At the time you made your first examination did you take his blood pressure? A. I did not.

Q. You examined him primarily for his back and leg? A. That is right.

Q. At the time you examined him the first time did he complain to you about any dizziness or nosebleeds?

A. No, there was no mention of that.

Q. As a matter of fact, according to your testimony at the prior hearing, you testified he merely mentioned that to you the second time, about headaches, together with dizziness, about a month prior to the time you examined him the second time, according to your testimony?

A. I don't recall exactly how it was mentioned. I think it was on direct questioning that it was brought out that the patent had been dizzy.

In this type of an examination, which I am called on to do from time to time, my examination is done

(Testimony of Dr. Theodore J. Pasquesi.)

from an orthopedic standpoint. We usually don't take blood pressure readings or test the eyes or a multitude of things you would do in connection with a general examination.

However, he was complaining of cramping in his legs and stated that he could only walk a few blocks and he had [108] cramps in his legs.

Naturally, in my medical training I was taught that usually a cramping in the legs had something to do with a circulatory disorder. Therefore, I changed my type of examination and went back to check to see if I could find some reason for the cramping in his legs, and I was quite astounded to find that the man had such a high blood pressure.

Q. Didn't he complain to you that he had cramping in the legs on the first examination?

A. I do not recall any such complaint.

Q. Just by general observation of the man's features, did they indicate, on the first examination, that he was suffering from high blood pressure?

A. I can't answer that. I don't know.

Q. If, prior to the accident, Mr. Strand had the symptoms he now complains of, would he have been able, in your opinion, to carry on the work he had been doing as a longshoreman?

Mr. Erskine B. Wood: Can you be a little more definite? Are you speaking of the symptoms in connection with the back injury?

Mr. Jacobson: I mean the hypertension symptoms.

A. Could I have that question again, please?

(Testimony of Dr. Theodore J. Pasquesi.)

The Court: He wants to know if he had this hypertension he has now could he have carried on his work as a longshoreman up to the time of the accident.

A. I am still a little bit vague on the question. [109]

The Court: You go on and ask him.

Mr. Jacobson: Q. Assuming that the man was suffering from the ailments you found him to be suffering from at the time you made your second examination, would he have been able to carry on the work of a longshoreman prior to the accident, if he had it prior to the accident?

A. Cramping, you are speaking of now?

Q. Hypertension.

A. Hypertension? Well, many men work with blood pressures that high. The thing that most impressed me was the fact that he was having cramps in his legs, and dizziness. Those are subjective findings, not objective findings.

I don't know whether he could or not. Those are statements of fact, not findings.

Q. Did you, by chance, examine the clinical record of the man at the hospital?

A. I did not.

Q. You don't know, then, what the blood pressure readings were? A. No, I don't.

Q. At the time he was in the hospital?

A. No, I don't.

Q. Is it not a fact, Doctor, that a man who has longshored to any extent may develop neuritis?

(Testimony of Dr. Theodore J. Pasquesi.)

Which, in turn, increases his blood pressure to the point where it develops into a hypertension? [110]

A. I don't think I can answer that.

The Court: What you mean is that that is not in your field?

The Witness. I don't think I am qualified to answer that, your Honor.

Mr. Jacobson: Q. Assuming there is testimony to the effect that he was suffering from dizziness and nosebleeds and, sometimes, a shortness of breath, and that he loses consciousness and is forgetful,—that if he had those symptoms prior to the accident would he still be able to do longshore work?

A. Of course, that might have been the cause of his accident, you see.

Q. You do not profess to be an expert in the field of hypertension, do you, Doctor?

A. I do not.

Q. Your testimony, as a matter of fact, is based upon the last examination you made when you found him to have high blood pressure?

A. That is correct.

Q. And your conclusion, your opinion, that he had it prior to the accident, is that based upon your medical knowledge of hypertension?

A. My general medical knowledge, yes.

Mr. Jacobson: That is all.

Mr. Tatum: That is all.

(Witness excused.) [111]

[Endorsed]: Filed Nov. 1, 1951.

DEFENDANT'S EXHIBIT No. 12

[Title of District Court and Cause.]

DEPOSITION OF NICHOLAS VARDALAAHOS

Taken in behalf of Respondent

Be It Remembered That, pursuant to oral stipulation hereinafter set out, the deposition of Nicholas Vardalaahos, the above-named witness, was taken on behalf of the Respondent before Don E. Devlin, a Notary Public for Oregon, on Saturday, the 23rd day of December, 1950, beginning at 9:35 o'clock a.m., at the law offices of Wood, Matthiessen & Wood, 1310 Yeon Building, in the City of Portland, County of Multnomah, State of Oregon.

Appearances: Messrs. Leo Levenson and Samuel Jacobson, attorneys for the Libelant; Wood, Matthiessen & Wood (by Mr. Lofton L. Tatum), attorneys for Respondent.

STIPULATION

(It Is Stipulated and Agreed by and between the attorneys for the respective parties that the deposition of Nicholas Vardalaahos may be taken on behalf of the Respondent at the office of Wood, Matthiessen & Wood, 1310 Yeon Building, in the City of Portland, County of Multnomah, State of Oregon, on Saturday, the 23rd day of December, A.D. 1950, beginning at 9:35 o'clock a.m., before Don E. Devlin, a Notary Public for Oregon, and in shorthand by the said Don E. Devlin.

Defendant's Exhibit No. 12—(Continued)

(It Is Further Stipulated that the deposition, when written up, may be used on the trial of the cause as by law provided; that all questions as to notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time the questions are asked, and that all objections as to materiality, relevancy and competency of the testimony are reserved to the parties until the time of trial.

(It Is Further Stipulated that the reading over of the testimony to or by the witness and the signing thereof are hereby expressly waived.)

Nicholas Zafiratos, Interpreter, was thereupon sworn by the Notary.

NICHOLAS VARDALAAHOS

was thereupon produced as a witness on behalf of Respondent and, having been first duly sworn by the Notary, was examined and testified through the interpreter as follows:

Direct Examination

Q. (By Mr. Tatum): Your name is Nicholas Vardalaahos? A. Yes, sir.

Q. Are you the Second Mate aboard the S.S. Stathes Yannaghas? A. Yes, sir.

Q. Is that ship going to leave Portland today?

A. Perhaps; probably.

Q. Do you expect to be back in Portland within the next three months?

Defendant's Exhibit No. 12—(Continued)

A. They believe so. Not quite positive.

Q. Do you know the route that your ship will take for the next six months?

A. I don't know.

(Discussion off the record.)

Mr. Tatum: Q. Were you on the Stathes Yannaghas on December 12, 1950, in Portland, Oregon, when a longshoreman was hurt in the No. 4 hatch of that ship? A. I was on the ship.

Q. Did you see this longshoreman, whose name was Strand, fall in the No. 4 hatch?

A. I was—I didn't exactly see him fall. I saw him working with the tools and then in the split second he was gone.

Q. Where were you standing when you saw this man doing the work which resulted in his fall?

A. I was standing on the hatch above him to his left and I saw him fall, saw him doing the——

Mr. Evangelos Livaniou: On the left, port side of the deck, of the hatch. He was standing on the port side of the hatch square.

Mr. Tatum: Do you want to incorporate that in his answer?

Mr. Evangelos Livaniou: Now I am explaining that he does not describe it as it is in his explanation, you see.

Mr. Nicholas Zafiratos: I am mixed up with these technical terms here. I never heard the word "hatch" before.

Mr. Tatum: If there is any objection to this

Defendant's Exhibit No. 12—(Continued)

added interpretation, say so, and we will cross it off. I think it adds to it.

Q. Was this accident that you witnessed at about three to three fifteen o'clock in the afternoon?

A. It was at that time.

Q. About how far away in feet were you from the man when you first saw him?

A. Twelve feet in a direct line.

Q. Where was the longshoreman standing when you first saw him?

A. (Through Evangelos Livaniou as interpreter): At the third hatch board, hatch board on the second space from forward, starting from forward.

(Discussion off the record.)

Mr. Tatum: Q. Were there any hatch boards in place in the forward space?

A. (Through Evangelos Livaniou as interpreter): They were the two hatch boards on the forward space and two hatch boards on the second space.

Q. Were these two hatch boards that were in place in the forward space and the hatch boards that were in place on the second space on the starboard side or the port side?

A. To the starboard side. On the starboard side beginning from the square of the hatch of 'tween decks towards the port side.

Q. Were these hatch boards being put in place n the 'tween decks or on the main deck?

Mr. Evangelos Livaniou: Repeat please.

Defendant's Exhibit No. 12—(Continued)

Q. Were these hatch boards being put in place in 'tween decks or on the main deck?

A. On 'tween decks.

Q. Where was the man standing with reference to the athwartship, towards the center of the ship or towards the starboard side or towards the port side, the longshoreman?

A. To the starboard side of the ship. Between the forward, the forward aft line of the ship. That means between the middle of the ship and the starboard side of the square of the hatch.

Q. Was the longshoreman standing on the first space, forward space, or the second space?

A. On the second space.

Q. What was the longshoreman standing on when you first saw him?

Mr. Evangelos Livaniou: What?

Mr. Jacobson: What?

Mr. Tatum: Q. Yes, on what was he standing?

A. On the hatch board on the second space.

Q. Was the hatch board squarely placed between the hatch beams, the one on which the longshoreman was standing? A. No.

Q. How was that hatch board placed?

A. The hatch board that the longshoreman was standing on the forward, from the forward part, it was in its place, but the aft part was standing on the vertical flange of the beam.

Q. What was the longshoreman doing when you first saw him?

A. When he—when I first saw him, I saw him

Defendant's Exhibit No. 12—(Continued)

keeping a piece of wood, a length of wood, like I say, which he was trying to put the forward hatch board on the forward space, the forward hatch board from these hatch boards that he was standing, on the forward space, and trying to put that hatch board on its place with that piece of wood between the forward beam and the hatch board. If you want me to describe, sketch, like I say, I could give it, the sentiment, to understand me better what I mean.

Q. Mr. Vardalaahos, would you draw a sketch of what this man was doing when you saw him (handing paper and pencil to the witness).

A. (Witness drawing): Those four hatch boards, one, two, on the forward space and one, two, on the second space were in their places.

Q. Now, the ones that are marked on this sketch as number one and number two forward and number one and two in the after space were the four hatch boards that were squarely in place at the time?

A. Yes, this hatch board, the third hatch board on the, on the first space was not squarely placed as the others, and was on the beam also, the aft hatch board, directly from the one we mentioned, the third one was on the beam.

Q. Then, as I understand it, the two hatch boards we've numbered as "3" were not in place——

A. No.

Q. ——squarely, but were resting with the forward ends of each hatch board in place?

Defendant's Exhibit No. 12—(Continued)

A. In its place, yes.

Q. And the aft end of each hatch board——

A. On the beam.

Q. ——were upon the beam? A. Yes, sir.

Q. Those are the number 3's? A. Yes.

Q. Now——

A. (Continuing): The longshoreman was standing on the third hatch board on the second space, having a wood between the beam and the third hatch board on the first space trying to put the third hatch board of the first space in its place.

Q. Then what happened while he was doing that?

A. Well, after that actually show this whole business put in, trying to put this hatch board, the third hatch board of the space with the wood and, of course, in a few seconds he just heard the knock, a knock, and just looking again he, he wasn't following, he says, always the longshoreman with his eyes. He says he not follow with his eyes. He heard the knock and he looked down and saw the man below in the hatch.

Q. Then what did you do?

A. Well, just he sent for me. He sent for me.

Q. He sent for the Mate?

A. Yes, and at once then when he called me I went down below the hatch and trying—in the meantime another workman, longshoreman, went down below in the place that the man was fall down.

Q. Was there anyone else standing on the deck with you, Mr. Vardalaahos?

Defendant's Exhibit No. 12—(Continued)

Mr. Evangelos Livaniou: On the main deck, you mean?

A. No, he was not anyone with him, but there was some longshoremen on the starboard side of the main deck.

Mr. Tatum: That's all.

Cross Examination

Q. (By Mr. Jacobson): How long have you been in the ship's service?

Mr. Evangelos Livaniou: In that ship's service or all sea life, you mean?

Q. On the ship.

Mr. Evangelos Livaniou: On that ship.

A. From 11th of March.

Q. Do you know how old the ship is?

A. 1944 builded.

Q. What type of cargo is it capable of carrying?

A. Anything.

Q. Do you know what the longshoremen were doing on the ship in Portland, Oregon?

Mr. Evangelos Livaniou: Pardon?

Q. Do you know what the longshoremen were doing on the ship in Portland, Oregon, at this particular time when the accident happened?

A. They were doing shifting boards. That means lining. We call it shifting boards.

Q. They were lining the ship for a certain type of cargo? A. Yes.

Q. What type of cargo were they lining the ship for? A. For grain.

Defendant's Exhibit No. 12—(Continued)

Q. Are you acquainted with the structure of the hatch boards, hatch covers?

Mr. Evangelos Livaniou: Acquainted?

Q. Acquainted. Does he know them?

Mr. Evangelos Livaniou: Repeat please the question.

Mr. Jacobson: Read it.

(The question was read by the reporter.)

A. Yes.

Q. Will you describe the type of hatch covers that are used on this boat that you are on now.

Mr. Evangelos Livaniou: If he could describe the hatch board?

Q. That are used on this boat.

Mr. Evangelos Livaniou: Uses in that ship.

A. These hatch boards are standard, every liberty ship has the same hatch boards.

Q. What type are they? We would like to know in the record what type they are. How are they built?

Mr. Evangelos Levaniou: You mean you want him to describe you, to sketch you?

Q. Well, what we want to find out is if they are one board or whether they are several boards put together or whether they are made of steel or what they are made of, how they are made.

A. Each hatch board, each hatch board consists from three planks, like I say, from three pieces, and between—pass through that pieces is a, pass an iron bar, and on the forward, on the one side, end

Defendant's Exhibit No. 12—(Continued)

of the hatch board, and on the other side, other end, other side of the hatch board it is round with an iron blade, like I say, about so wide (indicating), about three inches wide and thickness, with a one-eighth, let's say, and this is connected with boards on the rivets from one side to the other, you know, between the plank. On the cover the handle is also in one corner and the other corner they have a handle that everybody, two men can lift it and move it where they like.

Q. Are they pretty heavy, are they very heavy?

A. No.

Q. About how much do they weigh?

A. About 15 to 20 pounds.

Mr. Evangelos Livaniou: When he say about around 20 pounds, but, you know, he can't describe exactly the weight. He can lift it by himself.

Q. Around the end of these hatch covers you say that there are iron bands; is that correct?

Mr. Evangelos Livaniou: Iron blades, you mean?

Q. Iron bands. A. Yes.

Q. Is some of the wood permitted to stick out a little bit beyond the iron bands?

A. About half an inch, just half an inch outside from the——

Mr. Evangelos Livaniou: Well, make this suggestion for you. I will just to explain you exactly what I mean. This is the hatch board (indicating); this is consists from one, two, three pieces. The thickness of the hatch board is about three inches. Well, through in the middle pass one iron bar, all

Defendant's Exhibit No. 12—(Continued)

the pieces, right in the meantime connects the board here and here around here is about like this, around here, all here it is the iron blade (indicating). And here it is with rivets and bolts, also the other side. In the meantime the iron blade comes about here (indicating). See, from here to there it is the half inch that we say.

Q. It is wood? A. Yes.

Q. Now, these hatches are made to fit on the flange between the uprights of the cross beams; is that correct?

Mr. Evangelos Livaniou: Repeat the question, please.

Mr. Jacobson: Read it.

(The question was read by the reporter.)

Mr. Evangelos Livaniou: The uprights, what do you mean by "uprights"?

Q. Between the cross beams or what are known as strong backs——

Mr. Evangelos Livaniou: Yes.

Q. ——there are flanges that stand out.

A. Flanges.

Q. And then vertical?

A. Vertical and horizontal.

Q. Vertical. Now, the vertical—the hatch covers fit on the horizontal flanges and snugly between the vertical flanges of the strong backs; is that correct?

Mr. Evangelos Livaniou: I will ask him.

A. Yes.

Q. These hatch covers are supposed to fit in any

Defendant's Exhibit No. 12—(Continued)

one of these sections of the hatch; is that correct?

A. You see, it depends from the cuts, and number four of the square cut, in 'tween decks, the forward hatch boards, the forward hatch boards they don't fit in, on the others, on all other spaces; all the hatch boards of all other places with the exception of the forward one, they don't fit on the forward space.

Q. Are the hatch covers in the No. 4 hatch marked so that you could place them exactly in a given spot in the various sections of the hatch?

A. No.

Q. How many hatch covers are needed in order to close off the No. 4 hatch altogether?

Mr. Evangelos Livaniou: You mean the 'tween decks or the main deck?

Mr. Jacobson: The 'tween decks, that is the one we are involved with.

Mr. Evangelos Livaniou: The one talking about?

Mr. Jacobson: That is right.

A. It is about 10 on each space.

Q. (By Mr. Jacobson): And there are six spaces; is that correct? A. Six spaces, yes.

Q. The hatch covers on the ship now, are they new hatch covers?

Mr. Evangelos Livaniou: You mean brand new?

Mr. Jacobson: Yes.

Mr. Evangelos Livaniou: Brand new?

Mr. Jacobson: New. New.

Defendant's Exhibit No. 12—(Continued)

A. They didn't come just from the shop right now but it is in a very good condition.

Q. The question I asked is whether they are new.

Mr. Evangelos Livaniou: You mean just to buy it?

Mr. Jacobson: Yes, new. New.

Q. Are they new? A. No.

Mr. Tatum: I think he answered that. He said they came from the shop.

Mr. Evangelos Livaniou: I gave the explanation, sir, that it is not from the shop but they are in a very, very good condition. That's correct.

Mr. Tatum: That was his answer.

Mr. Jacobson: Now, is that the answer that——

Mr. Evangelos Livaniou: Of the gentleman, yes. Of the gentleman.

Mr. Jacobson: That he gave?

Mr. Evangelos Livaniou: Yes.

Mr. Jacobson: Q. Is it not a fact that it was necessary to use 2 by 12 boards to fit into some of these sections of hold No. 4 because the hatch covers would not fit?

Mr. Evangelos Livaniou: It was not——

A. It was not necessary.

Mr. Tatum: Now, you ask him, don't answer it.

Mr. Evangelos Livaniou: Yes. Yes, I am asking the question again.

Mr. Tatum: Yes, don't answer it on your own.

A. It was necessary.

Mr. Jacobson: He wants to repeat the question?

Mr. Evangelos Livaniou: Yes.

Defendant's Exhibit No. 12—(Continued)

(The question was read by the reporter.)

A. Yes. It was necessary to put this board 2 by 12 just to try to put the hatch board in its place.

Mr. Jacobson: Q. Isn't it a fact that the hatch boards were unable to fit in between the strong backs and that was the reason why they had to use 2 by 12 boards?

A. He doesn't know. He does not know that.

Q. You saw the hatch covers on the ship, did you not, after they had put on 2 by 12 boards in their place?

Mr. Evangelos Livaniou: Repeat the question please.

(The question was read by the reporter.)

(Discussion between interpreters.)

Mr. Evangelos Livaniou: Read it again please.

(The question was ready by the reporter.)

Mr. Evangelos Livaniou: Read it again, will you please?

(The question was read by the reporter.)

A. Yes, I saw that.

Mr. Jacobson: Q. Then they used these 2 by 12 planks because they could not use the hatch boards in position, couldn't place it in position?

A. He doesn't know why they put these hatch boards. Because they couldn't use the hatch boards without putting this 2 by 12 boards.

Defendant's Exhibit No. 12—(Continued)

Q. In other words, the hatch boards just wouldn't fit in their place?

A. He said they could put the hatch boards.

Mr. Nicholas Zafiratos: They could have put the hatch boards in.

Mr. Evangelos Livaniou: Instead of putting the 2 by 12's.

Q. You stated before that the longshoreman was trying to pry, to place one of these hatch boards, hatch covers? A. Yes, sir.

Q. And the reason why he was trying to force it into place is because it wouldn't fit?

A. He doesn't know if the hatch, this hatch board was fitting or not, if it was long, short or if he didn't put it right in a right position to fit right away or something. And if they show, when they understand that this hatch boards, they don't fit properly, they had to tell us to tell the Mate that this hatch boards are not fitting.

Q. That isn't the question.

A. As they did ask some other things about the ladders and we did repair them. We did repair these ladders for them and so on and so forth.

Q. The question is whether or not these hatch boards that were on the ship, or the hatch covers that were on the ship, whether or not they were able to fit in the No. 4 hold in the 'tween decks, these very sections formed by the strong backs, that's the question.

Mr. Evangelos Livaniou: Yes, he's——

Mr. Jacobson: Ask him that.

Defendant's Exhibit No. 12—(Continued)

Mr. Evangelos Livaniou: I said it means him——

A. I said that I don't know if he was putting the boards in the right position so to fit properly.

Q. Now, these boards, these hatch covers, were not numbered in any way, were they?

A. In no ship it is, they are numbers on the hatch boards.

Q. Well then, these were not numbered?

A. Not—not this ship the hatch boards are numbered, not even in our ship, but we have the example that the two hatch boards on the forward space, the two first hatch boards on the forward space, they were already in their places.

Q. And these two hatch boards were fitting very snugly: is that correct? They fitted snugly in place?

A. Yes, it was very good placing.

Q. Now, if these hatch covers, except those that you say are smaller for the number one section of the forward part, are all alike, why would it be necessary to try to pry them into place?

Mr. Evangelos Livaniou: Would you read the question?

(The question was read by the reporter.)

A. Maybe anything else, maybe something else happened.

Q. Now, these strong backs on the 'tween decks, were they all in line, were they all lined properly?

A. There is a slight difference. There is not—it is not straight line, it's a little bit declination, like I say.

Defendant's Exhibit No. 12—(Continued)

Q. They actually are not in first class shape; is that correct?

A. Is not as they were at the first moment it been put in its place.

Q. They have crooks in some of them, is that correct?

Mr. Evangelos Livaniou: Crooks?

Mr. Jacobson: Yes, bends in some of them. Bends?

Mr. Evangelos Livaniou: What do you mean, the whole beam? The whole beam?

Mr. Jacobson: They are warped, they are not in line.

Mr. Evangelos Livaniou: The whole beam?

Mr. Jacobson: Yes, the strong beam, the strong backs.

A. There is a regular bended, it is not waving, but just a regular bend.

Q. So that none—so that they are not all parallel with each other like they were when the ship was first built?

A. (Drawing on envelope): They are parallel, but they are—it is a little bit bended as you see here there on the sketch (indicating).

Q. Now, is that the way they were supposed to be when the ship was first built? A. No.

Q. And these bends in these strong backs, is that the reason why these hatch covers wouldn't fit as they are intended to fit snugly on the flanges?

A. There is not absolutely the reason that the hatch boards were not, they were not fitting for that

Defendant's Exhibit No. 12—(Continued)

bending. They kind of put it in its place, but it needs trying.

Q. You would have to pry them in order to put them in their place?

A. You have to try. He said that he has—you have to try.

Q. You have to force them?

Mr. Tatum: No, try.

A. Try.

Mr. Jacobson: Try.

Q. Now, those strong backs are not in first class shipshape condition, are they?

(Discussion between interpreters.)

Mr. Evangelos Livaniou: What do you mean by "first class"?

Mr. Jacobson: A shipshape condition so that the hatch covers would fit without having to work at them, just put them in place and that would be the end of it. Without forcing them.

Mr. Evangelos Livaniou: The beams? Read it please.

(The question was read by the reporter.)

A. Only No. 4 hatch it happens to these and it is because of the construction of the liberty ships. Every ship has the same, let us say, trouble with these beams. And——

Q. It is just——

Mr. Tatum: Let him finish.

A. (Continuing): Other than it happens to this, this happens, this little bended happens in No. 2 or

Defendant's Exhibit No. 12—(Continued)

other in No. 4 because of the construction of the liberty ship.

Mr. Jacobson: Q. In other words, it is because of defective construction that is causing these beams to get out of line?

Mr. Evangelos Livaniou: Yes, that is what it means——

Mr. Jacobson: Ask him the question.

A. Yes.

Q. And that's the reason why you have got to sometimes use 2 by 12 boards instead of the hatch covers to cover the sections?

A. We never use these hatch boards 2 by 12's because we put, we use a bulk cargo, cargo in bulk.

Q. You always use bulk cargo in this ship?

A. Most of voyages we carry bulk cargo.

Q. And you don't bother putting the hatch covers on the 'tween decks at all then?

A. Only if we put different cargo than bulk, then we have to put the hatch boards on the 'tween decks.

Q. Did you have to put the hatch boards on the ship now because of the type of cargo you are going to pick up in this locality?

Mr. Evangelos Livaniou: Now?

Mr. Jacobson: Yes.

A. Now, it's not necessary, the hatch boards to go in their places because the whole cargo it is one type.

Q. Does he know why they were putting the hatch covers then on the 'tween deck?

Defendant's Exhibit No. 12—(Continued)

A. You see, he didn't know why they putted this hatch board on their places, but afterwards he learned why they were put in this hatch boards.

Q. Why were they doing that?

A. Because they said that the—they were going to make lining.

Q. Well, in order to line the ship then it is necessary to put the hatch covers on the 'tween deck hold No. 4?

A. They put it for their own safety.

Q. And the ones that came with the ship apparently didn't fit; is that correct?

Mr. Evangelos Livaniou: Repeat it.

(The question was read by the reporter.)

A. Apparently they didn't fit, no. Didn't fit.

Q. Didn't fit into this hatch No. 4?

Mr. Tatum: The hatch boards. Make it the hatch boards.

Mr. Jacobson: Q. The hatch boards didn't fit in hatch No. 4?

Mr. Evangelos Livaniou: Repeat it, please.

(The question was read by the reporter.)

A. If they were trying they could find the hatch boards that were going in their places.

Q. They would have to then select from the 60 hatch boards the exact kind of hatch board that might fit in a specific section; is that correct?

(Short recess.)

Mr. Jacobson: All right, repeat the question.

Defendant's Exhibit No. 12—(Continued)

(The question was read by the reporter.)

A. Well, they have to do it as far as they could, they could make them fit.

Q. The answer then is that they would have to make a selection?

A. For their own safety they have to do it or they had to call the Mates.

Q. Does he know how far the longshoreman fell into the hold?

Mr. Evangelos Livaniou: You mean inside?

Mr. Jacobson: The distance, yes.

A. About 22 feet. About 22 feet, but you can find out, of course, by measuring, exactly.

Q. Was there anyone else standing with Mr. Strand in the 'tween decks working on these hatches, hatch covers?

A. When he first saw Mr. Strand, he saw only Mr. Strand, but as when he fell down he saw another man going from 'tween deck down to the main hold, so he doesn't know where he was. Maybe he was aside and he couldn't see, he didn't see him at once, you know.

Q. Does he know whether or not the seamen on the boat know exactly what hatch boards to place in these various sections in order for them to fit?

Mr. Evangelos Livaniou: Repeat.

(The question was read by the reporter.)

A. Our seamen put them in their places if it is necessary.

Defendant's Exhibit No. 12—(Continued)

Q. Well, do they know exactly which hatch cover to put in which specific spot?

A. All hatch boards are the same, but if one does not fit in this place, they leave it and take another one which goes and so on so forth.

Q. Well, the hatch boards then are placed around the hatch hold itself, all around; they are not piled in one spot, are they, when the hatch is open?

A. They are in a—in their places as they take them off. They put it in place and to show—if they want to put it back again, they take from the same place and put it.

Q. Now, were the hatch covers aboard the ship at the time Mr. Strand was putting them in place, were they piled up that way?

A. When he saw them they were like this.

Q. Did Nicholas show them exactly where to put these various hatch boards?

Mr. Evangelos Livaniou: Repeat, please.

(The question was read by the reporter.)

Mr. Evangelos Livaniou: Show them? You mean tell them, point them?

Mr. Jacobson: Yes.

Mr. Tatum: Show the longshoremen, you mean?

Mr. Evangelos Livaniou: You mean show the longshoremen?

Mr. Jacobson: Yes.

A. No, no one longshoreman came to ask him to point, to show him the hatch boards.

Defendant's Exhibit No. 12—(Continued)

Mr. Jacobson: Q. Did Nicholas or anyone else that he knows of tell the longshoremen that they'd have to try to fit these various hatch boards in certain spots because the strong backs were not even or straight?

Mr. Evangelos Livaniou: Read it.

(The question was read by the reporter.)

A. No, no one told them because, because no one knew that they were working in No. 4 because they had only just gone down and they had put only just a few hatch boards in their places.

Q. Well then, no notice was given to these longshoremen that the strong backs and the hatch covers had to be matched in order for them to fit?

Mr. Tatum: No notice by whom?

Mr. Jacobson: No notice was given by anyone on the ship.

Mr. Tatum: If he knows.

Mr. Jacobson: If he knows.

A. First of all no one told us that they were going to work in No. 4 or that they wanted to put hatch boards in 'tween deck of No. 4, and so no one told them.

Q. Nicholas saw them working on the No. 4 hatch, did he not?

A. He didn't, he didn't see them working in No. 4 hatch. He was forward and as he was coming aft he passed from No. 4 and saw, and saw the accident happened.

Defendant's Exhibit No. 12—(Continued)

Q. He just happened to be passing by the hatch when he saw the accident happen?

A. Yes, just by like, let us say, he passed through the hatch, has not a special job to go in No. 4 hatch to see what happens in there because we didn't have anything to do to look after the longshoremen doing the lining.

Q. He didn't stop, did he, to look down from the main deck into hold No. 4 and see what was going on?

Mr. Evangelos Livaniou: Repeat, please.

(The question was read back by the reporter.)

A. Yes, he stopped but as he stopped he saw the longshoreman, what he was trying, so he didn't have even time to tell him anything because just in the meantime he fell. This happened, he says, in just a few seconds.

Mr. Jacobson: Now, what is your name? You were acting as an interpreter and we would like to know what your position is on the boat and your name.

Mr. Evangelos Livaniou: My name—I have given him my name—is Evangelos Livaniou.

Mr. Jacobson: What is your position on the boat?

Mr. Evangelos Livaniou: Chief Officer.

Mr. Jacobson: That's all.

Mr. Tatum: I would like to ask a question of the interpreter into the record. You have been present during all of this testimony, have you not?

Mr. Nicholas Zafiratos: Yes, sir.

Defendant's Exhibit No. 12—(Continued)

Mr. Tatum: You have heard the interpretation of the questions which were propounded by me and by Mr. Jacobson. Has that interpretation as given by Mr. Livaniou been a full, true and correct interpretation of the questions?

Mr. Nicholas Zafiratos: Yes.

Mr. Tatum: Have you also listened to the answers as given by Mr. Vardalaahos?

Mr. Nicholas Zafiratos: Yes.

Mr. Tatum: Have you listened to the interpretation of those answers as given into the record by Mr. Livaniou?

Mr. Nicholas Zafiratos: Yes.

Mr. Tatum: Has the interpretation given been a full, true and correct interpretation from Greek into English of Mr. Vardalaahos' answers?

Mr. Nicholas Zafiratos: Yes.

Mr. Tatum: I would like to ask one further question of Mr. Vardalaahos.

Q. Have you served on other liberty ships than this present ship?

A. (Through Mr. Evangelos Livaniou as interpreter): From 1946 up to date on liberty ships.

Q. Is the construction of this ship so far as you can tell the same as the construction on other liberty ships that you have served on?

A. Yes, it is all about the same. The construction of the liberty ships, the ones that he has served on.

Mr. Tatum: Mr. Vardalaahos, would you sign

Defendant's Exhibit No. 12—(Continued)

this little sketch that you made for us earlier in the testimony.

(Witness complies.)

(Discussion off the record.)

Mr. Tatum: Q. Mr. Vardalaahos, when the reporter has finished transcribing your deposition, you have the right to read it over and sign it. You likewise have the privilege of waiving that. I ask you if you waive the reading and signing of your deposition?

A. (Through Mr. Evangelos Livaniou as interpreter): The answer is yes.

(Witness excused.)

(Signature waived.)

State of Oregon,
County of Multnomah—ss.

I, the undersigned, Don E. Devlin, a Notary Public for Oregon, duly commissioned and qualified, do hereby certify that Nicholas Vardalaahos appeared before me at the time and place mentioned in the caption and stipulation set out on pages numbered 1 and 2 of the foregoing transcript; Messrs. Leo Levenson and Samuel Jacobson, of attorneys for plaintiff, appearing in his behalf, and Mr. Lofton L. Tatum, Esq., of attorneys for defendant, appearing in its behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, in answer to oral in-

Defendant's Exhibit No. 12—(Continued)

terrogatories and cross interrogatories propounded by the attorneys for the respective parties, testified as in the foregoing annexed deposition, pages 1 to 27, both inclusive, set forth.

I further certify that all interrogatories and cross interrogatories propounded to said witness, together with the answers of said witness thereto, and other proceedings occurring upon the taking of said deposition were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction, and that the foregoing transcript, pages 1 to 27, both inclusive, constitutes a full, true and accurate transcript of said deposition so taken by me in shorthand as aforesaid, and of the whole thereof; and that the submission of the deposition when fully transcribed to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and signing of same by the witness were waived by the witness and by the parties.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 6th day of January, A.D. 1951.

[Seal] /s/ DON E. DEVLIN,
Notary Public for Oregon.

My commission expires February 3, 1952.

DEFENDANT'S EXHIBIT No. 14

Theodore J. Pasquesi, M.D.
Physician and Surgeon, Orthopaedic Surgery
916 Old Journal Bldg., 806 Southwest Broadway
Portland 5, Oregon

January 26, 1951

Wood, Matthiessen & Wood, Attorneys,
Yeon Building, Portland, Oregon.

Re: Olaf Strand, Jones Stevedore Co.
Attention: Mr. L. Tatum

Dear Sirs:

Mr. Strand reported to my office 1/25/51 for examination relative to injuries sustained on 12/12/50 when, while working for the Jones Stevedore Company aboard ship (he does not know the name of the ship), he was injured as he was lining a twin deck. One of the hatch covers slipped and he fell about twenty-five or thirty feet, striking the bottom of a hold. He states he was unconscious until he was on the dock lying on a stretcher waiting for an ambulance. He was then taken to St. Vincent's Hospital where he was seen by Dr. Howard Cherry of Portland. Dr. Cherry sutured a laceration of his lower lip, placed him in bed and gave him symptomatic and emergency treatment. The next day his back was x-rayed but he states no fractures were found. He was kept in bed for most of the next three weeks and was discharged from St. Vincent's Hospital some time between Christmas and New Year's

Defendant's Exhibit No. 14—(Continued)

Day of 1950. He has reported on two subsequent occasions to Dr. Cherry's office.

The injuries the man sustained were a cut of the lower lip on the left side, a painful back and a painful left leg from the left knee to the hip on the inside. His back bothers him mainly when he tries to stoop over. He is using a cane because of pain on the inside of his left knee and upper leg.

Past History: The man is a 63 year old male, who has worked for the past 30 or 40 years as a longshoreman, and has previously had only one accident, that being a fractured toe about 15 years ago.

Present Complaint: His back is stiff, but not very painful. When he bends over he has to go slowly because he will lose his balance, and he has some pain on extreme bending. He also states that his left leg is insecure and that it hurts him to twist his knee in with his foot in a stationary position.

The man was stripped for examination. It is found that he has about a one inch curved laceration at about the junction of the middle and outer thirds of the lower lip on the left side. This scar extends into the mouth itself. This is fully healed, non-adherent, non-painful, but is depressed in the center and leaves a cosmetic deformity, not functional, however. In the standing position the man was asked to touch the floor with his hands without bending his knees and is able to come within 10 inches of the floor. He goes slowly. but no muscle spasm is evident. He states he has a feeling of pulling while doing this. In the prone position no marked tender-

Defendant's Exhibit No. 14—(Continued)

ness is found in his back and in the supine position it is found that he has some limitation of external rotation of both hips amounting to about 30 degrees. Abduction of the left hip with the knee flexed and external rotation of the hip at the same time causes pain in the region of his knee on the medial side and extending up from the knee about six inches. Internal rotation of the knee with the leg bent causes the same type of pain. The man was asked to squat with his legs beneath him and this also elicited pain to the same region. Examination of the knee reveals that all the ligaments are intact, there is no tenderness in the region of the semilunar cartilages, there is no tenderness to touch. His reflexes are all equal and normal on both sides. The man was sent to the Physicians and Surgeons Laboratory in the Jackson Tower for x-rays of his lower back and his left knee. There are no pertinent pathological deformities of note. The x-ray report by the radiologist is as follows: "Lumbar spine: there is no evidence of recent bone injury. There is moderate arthritic lipping of the entire lumbar spine. There is moderate narrowing of the lumbosacral interspace, with some sclerosis of the apposing joint surfaces. There are some calcified plural plaques over the base of the left lung posterior. Left knee: There is no evidence of recent bone injury. There are no significant arthritic changes present."

Diagnosis: As a result of this injury this man sustained a laceration of the left lip which now

Defendant's Exhibit No. 14—(Continued)

leaves no disability except a cosmetic deformity. He received a lumbo-sacral contusion and sprain which should recover under conservative therapy. The pain in his knee I do not believe is related to his knee directly, but rather is a sartorious muscle sprain.

Conclusion: Because of this man's age he will recover slowly. It is my impression that he will be unable to do longshoring work for a period of about three months but that he should have no permanent disability at the conclusion of this period of time except for the obvious deformity of the lip, which is cosmetic rather than functional.

Sincerely,

/s/ THEODORE J. PASQUESI,

TJP:em

[Endorsed]: No. 13229. United States Court of Appeals for the Ninth Circuit. Michael Kulukundis, Appellant, vs. Olaf N. Strand, Appellee. Apostles on Appeal. Appeal from the United States District Court for the District of Oregon.

Filed: January 11, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

In Admiralty

No. 13,229

MICHAEL KULUKUNDIS,

Appellant,

vs.

OLAF N. STRAND,

Respondent.

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

Point I.

That the ship was not unseaworthy nor negligent, since seaworthiness is merely reasonable fitness, and the hatch-boards could have been made to fit, and if not, other boards were aboard which could have been, and in fact were, subsequently used and fitted by the stevedores themselves.

Point II.

Neither the alleged unseaworthiness of the hatch beams and boards, nor the alleged negligence in those respects was the proximate cause of libelant's injury, but the proximate cause was the act of the stevedores themselves, (fellow workmen), not servants of the ship, in wrongly placing the board or boards on the beams in such manner as to make it possible for libelant to fall.

Point III.

Libelant saw and appreciated the conditions; says that he considered them dangerous; was under no obligation, like a seaman, to stay on the job, but nevertheless chose to do so, and assumed the risk, whether it be of unseaworthiness, or negligence.

Point IV.

Libelant's own sole negligence was the proximate cause of his injuries.

Point V.

Libelant's own negligence, if not the sole, was at least a contributory cause of his injuries.

Point VI.

The damages are excessive.

DESIGNATION OF RECORD

1. Amended Libel.
2. Claim of Owner.
3. Answer to Amended Libel.
4. Transcript of all testimony, together with exhibits.
5. Findings of Fact and Conclusions of Law.
6. Final Decree.
7. Notice of Appeal.
8. Petition for Appeal.
9. Order Allowing Appeal.

10. Citation.

11. Appellant's Assignments of Error.

12. Bond on Appeal.

13. Order Approving Bond for Staying Execution.

14. Points on which Appellant intends to rely.

15. This Designation of Record.

Dated at Portland, Oregon, January 16th, 1952.

/s/ WOOD, MATTHIESSEN & WOOD,
/s/ ERSKINE WOOD,
Proctors for Appellant Michael Kulukundis.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 18, 1952. Paul P. O'Brien, Clerk.

No. 13,237

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNIE ELLENBERGER,
Appellant,

vs.

EARL WARREN, JAMES R. AGEE, A. F. BRAY, RAYMOND E. PETERS and EDMUND G. BROWN,
Appellees.

APPELLEES' REPLY BRIEF AND MOTION TO DISMISS.

EDMUND G. BROWN,
Attorney General of the State of California,
WILLIAM M. BENNETT,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellees,
Earl Warren, A. F. Bray, Raymond E. Peters and Edmund G. Brown

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 13,237

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNIE ELLENBERGER,
Appellant,

vs.

EARL WARREN, JAMES R. AGEE, A. F. BRAY, RAYMOND E. PETERS and EDMUND G. BROWN,
Appellees.

APPELLEES' REPLY BRIEF AND MOTION TO DISMISS.

I.

HISTORY OF LITIGATION.

This matter was initiated in the District Court of the United States for the Northern District of California, Southern Division, by the filing of a complaint. On behalf of the above-named appellees a motion to dismiss was filed, which was granted on May 9, 1951, by Honorable George B. Harris, United States District Judge.

The plaintiff subsequently filed a petition for a rehearing of the motion to dismiss, which was likewise dismissed upon order of the Court, and the plaintiff

then moved for a default judgment herein, which application for default was dismissed on October 3, 1951. There then followed an appeal to this Court.

II.

ARGUMENT.

We have designedly omitted from this brief any statement of facts because no factual record was made below in the District Court. The matter was heard solely upon the pleadings which have been certified to this Court and upon the argument of counsel. There is nothing before this Court for consideration other than the question of whether or not the District Court properly granted the various motions to dismiss made on behalf of the appellees. It is our contention that those motions were properly granted.

All of the complaints filed in the District Court were vague and indefinite, both as to the legal grounds upon which suit was brought and the remedy sought against the appellees.

A motion to dismiss lies where the facts pleaded in the complaint fail to state a claim upon which relief can be granted.

> Federal Rules of Civil Procedure, Rule 12 (b) (6).

NO FEDERAL QUESTION IS HERE INVOLVED.

A motion to dismiss lies where plaintiff has failed in his complaint to state facts sufficient to give jurisdiction to the Federal Court over the subject matter of the action.

Federal Rules of Civil Procedure, Rule 12 (b) (1).

THESE APPELLEES ARE IMMUNE FROM SUIT.

As is alleged in the complaint, and as this Court can notice judicially, no cause of action lies against State officers for wrongs done in the course of official conduct.

See:

Spalding v. Vilas, 161 U.S. 483,

and

Cooper v. O'Connor, 99 Fed. (2d) 135, 118 A.L.R. 1440.

As set forth in the *Spalding* case (page 498):

"* * * the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts * * * the head of an Executive Department, keep-

ing within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."

THIS IS AN UNAUTHORIZED SUIT AGAINST A STATE.

While ostensibly the complaints filed below purport to be directed toward individual defendants, they are, in fact, an effort to direct Federal action to remove certain officials from State office and to compel certain action upon the part of the judicial branch of the State of California. Such an action violates the Eleventh Amendment of the United States Constitution.

See:

In re Ayers, 123 U.S. 443, 505;
Smith v. Reeves, 178 U.S. 436, 447 and 448.

In the *Ayers* matter, it is stated (page 505):

"To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

See, also:

Missouri v. Fiske, 290 U.S. 18, 25 and 26,

where it is stated:

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States. 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' *Ex parte New York,* 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans v. Louisiana,* 134 U.S. 1, 10; *Palmer v. Ohio,* 248 U.S. 32, 34; *Duhne v. New Jersey,* 251 U.S. 311, 313, 314."

See, also:

Tinkoff v. Campbell, 86 Fed. Supp. 331.

APPELLANT IS ESTOPPED FROM BRINGING THIS ACTION.

The merits of this cause of action have already been decided in *Ellenberger v. Warren,* found in 90 Cal. App. (2d) 785.

Certainly, as to the appellee Earl Warren this matter is *res judicata.* This Court can take judicial notice of the decision in that case. Further, the appellant is estopped from bringing this action by virtue of the judgment in the decision immediately above referred to. Further, in this proceeding, the appellant cannot properly seek to set aside that judgment by alleging fraud in the original proceedings.

See:

Meader v. Norton, 78 U.S. 442, 457,

wherein the Court states:

> "Unquestionably it is a general rule that when jurisdiction is delegated to a tribunal over a subject-matter, and its exercise is confided to their discretion, the decision of the matter, in the absence of fraud, is in general valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, * * *"

See, also:

United States v. Kusche, 56 Fed. Supp. 201,

wherein the Court points out that litigation cannot be made eternal by reopening matters already decided by the mere allegation of fraud somewhere in the proceedings. On page 217 of the Kusche report it is stated:

> " 'On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any mat-

ter which was actually presented and considered in the judgment assailed. * * *

" 'But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted.' "

THE COMPLAINTS ARE BARRED BY THE STATUTE OF LIMITATIONS.

It is alleged in the complaints that on July 29, 1939, a false autopsy report was filed by the coroner of the City of Oakland. Plaintiff cannot now, twelve years after she first discovered the alleged fraud, seek to have that particular issue adjudicated in this Court. She is guilty of laches and unreasonable delay and the statute of limitations has barred her action as well.

III.

NOTICE OF MOTION TO DISMISS.

Wherefore, the appellees herein hereby give notice to Annie Ellenberger, appellant, that they will move this Honorable Court at the time this case is set for argument:

(1) To dismiss this appeal because this Court lacks jurisdiction over the subject matter of this action.

(2) To dismiss this appeal as frivolous and without merit.

Dated, San Francisco, California,
March 24, 1952.

Respectfully submitted,
EDMUND G. BROWN,
Attorney General of the State of California,
WILLIAM M. BENNETT,
Deputy Attorney General of the State of California,
Attorneys for Appellees,
Earl Warren, A. F. Bray, Raymond E. Peters and Edmund G. Brown.

No. 13,237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANNIE ELLENBERGER,

Appellant,

VS

EARL WARREN, JAMES R. AGEE, A. F. BRAY, RAYMOND E. PETERS and EDMUND G. BROWN,

Appellees.

REPLY BRIEF AND MOTION TO DISMISS FOR APPELLEE JAMES R. AGEE

J. F. COAKLEY,
District Attorney in and for the County of Alameda, State of California,

R. ROBERT HUNTER,
Assistant District Attorney in and for the County of Alameda, State of California,

RICHARD H. KLIPPERT,
Deputy District Attorney in and for the County of Alameda, State of California,

Attorneys for Appellee,
JAMES R. AGEE

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

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No. 13,237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANNIE ELLENBERGER,

Appellant,

vs

EARL WARREN, JAMES R. AGEE, A. F. BRAY, RAYMOND E. PETERS and EDMUND G. BROWN,

Appellees.

REPLY BRIEF AND MOTION TO DISMISS FOR APPELLEE JAMES R. AGEE

I

STATEMENT OF FACTUAL SITUATION OF CASE INVOLVING THE APPELLEE JAMES R. AGEE, JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA.

On June 17, 1948 appellant filed in the trial court a petition for writ of mandate, petition to clear the records, conspiracy to violate civil right, damages, against Governor Earl Warren and numerous city and county officials. This proceeding was based upon the action of the board of trustees of the Police Relief and

Pension Fund of the City of Oakland in denying appellant's claim for a widow's pension based upon a finding of said board that the injury which appellant's husband incurred was not received in the line of duty. All appellees in this action demurred and the demurrers of said appellees were sustained by Judge James R. Agee, without leave to amend, on numerous grounds including the ground that the statute of limitations had run against appellant's action. Your appellant appealed to the District Court of Appeal of the State of California from the ruling of Judge James R. Agee and the District Court of Appeal on March 23, 1949 affirmed the judgment of the trial court and of appellee James R. Agee, Judge of said Court. The action of appellee James R. Agee in sustaining the demurrers without leave to amend was the only action taken by said appellee James R. Agee in connection with any of the facts set forth in your appellant's complaint on file herein.

II

ARGUMENT.

This matter was heard solely upon the pleadings which have been certified to this Court and upon the argument of counsel. There is nothing before this Court for consideration other than the question of whether or not the District Court properly granted the various motions to dismiss made on behalf of the appellees. It is our contention that those motions were properly granted.

The Complaint in this Action Fails to State a Cause of Action.

This complaint is vague and indefinite, both as to the legal grounds upon which it is brought and the remedy sought against this appellee, and states no cause of action.

A motion to dismiss lies where the facts pleaded in the complaint fail to state a claim upon which relief can be granted.

Rule 12 (b) (6),
Federal Rules of Civil Procedure.

No Federal Question is Here Involved.

A motion to dismiss lies where plaintiff has failed in his complaint to state facts sufficient to give jurisdiction to the Federal Court over the subject-matter of the action.

Rule 12 (b) (1),
Federal Rules of Civil Procedure.

This Appellee is Immune from Suit.

As is alleged in this complaint and as this Court can notice judicially, no cause of action lies against a judicial officer for wrongs done in the course of official conduct.

Spalding v. *Vilas*, 161 U. S. 483.

Appellant is Estopped from Bringing this Action.

The merits of this cause of action have already been decided in *Ellenberger* v. *Warren*, 90 Cal. App. (2d) 785. The appellant is estopped from bringing

this action by virtue of the judgment in the decision immediately above referred to. Further, in this proceeding the appellant cannot properly seek to set aside that judgment by alleging fraud in the original proceedings.

Meader v. *Norton*, 78 U. S. 442, at 457.

See also:

U. S. v. *Kusche*, 56 Fed. Supp. 201,

wherein the Court points out that litigation cannot be made eternal by reopening matters already decided, by the mere allegation of fraud somewhere in the proceedings.

This Complaint is Barred by the Statute of Limitations.

It is alleged in this complaint that on July 29, 1939 a false autopsy report was filed by the Coroner of the County of Alameda; appellant cannot now—twelve years after she first discovered the alleged fraud—seek to have that particular issue adjudicated in this Court, after the same has been adjudicated before every appellate tribunal of the State of California.

III

NOTICE OF MOTION TO DISMISS.

Wherefore appellee James R. Agee hereby gives notice to Annie Ellenberger, appellant, that he will move this Honorable Court at the time this case is set for argument:

1. To dismiss the action because the Court lacks jurisdiction over the subject-matter of this action.

2. To dismiss the action because the complaint fails to state a claim upon which relief can be granted.

3. To dismiss the action because the complaint fails to state any claim or claims against the appellee upon which relief can be granted, as it cannot be ascertained how or in what manner appellee is liable in any manner for any wrongs suffered by the appellant.

4. To grant a summary judgment in favor of the appellee because the appellant is directly estopped to bring this action by virtue of the fact that this matter has already been adjudicated by the District Court of Appeal of the State of California in the case of *Ellenberger* v. *Warren*, 90 Cal. App. (2d) 785.

Dated: October 24, 1952.

J. F. COAKLEY,
District Attorney in and for the County of Alameda, State of California,

R. ROBERT HUNTER,
Assistant District Attorney in and for the County of Alameda, State of California,

RICHARD H. KLIPPERT,
Deputy District Attorney in and for the County of Alameda, State of California,
Attorneys for Appellee,

JAMES R. AGEE
Court House, Oakland 7, California.

No. 13238

United States
Court of Appeals
For the Ninth Circuit.

JOSEPH BOIS,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13238

United States
Court of Appeals
For the Ninth Circuit.

JOSEPH BOIS,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

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NAMES AND ADDRESSES OF ATTORNEYS

JOSEPH BOIS,
Alcatraz, California,
In Propria Persona,
For Appellant.

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney,
San Francisco, California,
For Respondent and Appellee.

United States District Court, for the Northern District of California, Southern Division

No. 31007

JOSEPH BOIS,

Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The application of Joseph Bois, for a writ of habeas corpus shows unto the Court the following:

1. That he is a citizen of the United States and a resident of Connecticut, but is now unlawfully imprisoned by the Respondent by virtue of a judgment of conviction of the United States District Court for the Eastern District of Kentucky.

2. That his conviction was obtained in violation of rights secured and safeguarded by the Fifth and Sixth Amendments to the federal Constitution.

3. That he was duped and inveigled into waiving the right to the assistance of counsel by an agent of the Federal Bureau of Investigation.

4. That he was induced to enter a plea of guilty through misrepresentation and false promise on the part of an agent of the Federal Bureau of Investigation, who persuaded petitioner to plead guilty on the promise that he could and would get the State

of Connecticut to withdraw a warrant ledged against him.

5. That the said agent of the Federal Bureau of Investigation represented himself to be working in concert with the Assistant United States Attorney in the prosecution of petitioner's case.

6. That upon arrest on July 4, 1948, and at the time of trial August 4, 1948, petitioner was only 22 years of age and unlearned in law and inexperienced in the operation of Courts and the Federal Police System. Therefore, he was little more than putty in the hands of the prosecution authorities, whom, he had been taught from childhood, could do no wrong.

7. That petitioner was confined in the dungeon section of the Vanceburg Kentucky Jail for four (4) days before he was taken before the United States Commissioner, and it was under these circumstances he waived his right to the assistance of counsel and agreed to enter a plea of gulity.

Wherefore, Petitioner Prays:

1. That process issue directing the respondent to show cause why petitioner should not be released from his illegal imprisonment.

2. That a hearing be held to determine the issue's of fact arising out of the petition for writ of habeas corpus.

3. That upon final hearing, petitioner's application for writ of habeas corpus be sustained, and for

such further and other relief as the Court may deem just and proper.

/s/ JOSEPH BOIS,
Petitioner.

Subscribed and sworn before me this 23rd day of Oct., 1951.

/s/ W. F. STUCKER.
Warden—Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Joseph Bois is a citizen of the United States.

[Endorsed]: Filed November 7, 1951.

[Title of District Court and Cause.]

ORDER

Examination of the petition for a Writ of Habeas Corpus reveals that petitioner has failed to comply with the provisions of 28 U.S.C.A. 2255. Therefore the petition is at this time premature and must be dismissed.

It Is Ordered that the petition be and the same is hereby dismissed.

Dated November 9, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed November 9, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Joseph Bois, the petitioner herein, hereby duly appeals the order of the Honorable Oliver J. Carter of November 9, 1951, dismissing his application for a Writ of Habeas Corpus, above entitled, to the United States Court of Appeals, Ninth Circuit.

November 14, 1951.

/s/ JOSEPH BOIS,
Petitioner-Appellant.

[Endorsed]: Filed November 29, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled matter and that they constitute the record on appeal herein:

Petition for writ of habeas corpus.
Order dismissing petition for writ.
Notice of appeal.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 7th day of December, 1951.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. W. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13238. United States Court of Appeals for the Ninth Circuit. Joseph Bois, Appellant, vs. Edwin B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court, for the Northern District of California, Southern Division.

Filed January 21, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13239

United States Court of Appeals

for the Ninth Circuit.

BEN A. PUENTE and MARION PUENTE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13239

United States
Court of Appeals
for the Ninth Circuit.

BEN A. PUENTE and MARION PUENTE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

**Petition to Review a Decision of
The Tax Court of the United States.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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APPEARANCES:

For Petitioners:

FRANK C. SCOTT, C.P.A.,
LAFAYETTE J. SMALLPAGE, ESQ.

For Respondent:

LEONARD MARCUSSEN, ESQ.

The Tax Court of the United States

Docket No. 24820

BEN A. PUENTE and MARION PUENTE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1949

Sept. 6—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 7—Copy of petition served on General Counsel.

Oct. 4—Answer filed by General Counsel.

Oct. 4—Request for hearing in San Francisco, California filed by General Counsel.

Oct. 5—Notice issued placing proceeding on San Francisco, California calendar. Service of answer and request made.

1950

Mar. 8—Hearing set May 8, 1950, San Francisco, California.

May 15—Hearing had before Judge Hill, on merits. Stipulation of facts filed. Briefs due 6/29/50. Replies due 7/31/50.

June 14—Motion to extend time to July 29, 1950, to file brief filed by General Counsel. 6/15/50 granted.

June 15—Transcript of hearing 5/15/50 filed.

June 22—Motion for extension to July 29, 1950, to file brief, filed by petitioner. Granted.

July 31—Brief filed by taxpayer. Copy served.

1950

Aug. 1—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 8/2/50 Granted.

Aug. 22—Reply brief filed by taxpayer. 8/23/50 Copy served.

1951

Aug. 20—Memorandum findings of fact and opinion rendered, Hill, Judge. Decision will be entered under rule 50. Copy served.

Aug. 29—Petitioner's computation filed.

Aug. 31—Hearing set Oct. 3, 1951 on petitioner's computation. Copy served.

Sept. 19—Respondent's computation filed.

Sept. 24—Decision entered, Hill, Judge, Div. 2.

Dec. 24—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Dec. 24—Entry of appearance of Lafayette J. Smallpage as counsel filed.

Dec. 26—Praecipe for record filed by taxpayer.

Dec. 28—Proof of service of petition for review filed by taxpayer.

Dec. 28—Proof of service of praecipe for record filed by taxpayer.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioners hereby petition for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (San Francisco Division/IRA:90-D:HM/(C-TS:PD/SF:ORM)) dated June 8, 1949, and as a basis of their proceeding allege as follows:

1. The petitioners are husband and wife whose residence address is Route 2, Box No. 253, Lodi, San Joaquin County, California. Their joint income tax returns for the periods here involved were filed with the collector for the first district of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioners on June 8, 1949.

3. The taxes in controversy are income and victory taxes for the calendar year 1943 in the sum of $262.43, that is, the total tax liability determined by the respondent, it being contended by the petitioners that they are entitled to a refund of all of the 1943 income and victory taxes withheld from the petitioner husband's wages in 1943 in excess of $71.46 already refunded, i.e., a refund of $63.35, for which the petitioners have filed with the collector for the first district of California a valid and sufficient claim for refund on or about the fourteenth day of August, 1946, which time of filing was less than three years from the date on which the

petitioner's income and victory tax return for the calendar year 1943 was due to be filed and was filed.

4. The determination of income taxes set forth in the said notice of deficiency is based on the following errors:

(a) In determining the petitioners' income tax net income and their victory tax net income for the calendar year 1943, the respondent erroneously failed and refused to allow the deduction of a net operating loss carry-back from the calendar year 1945 in the amount of $2,601.39, or in any amount whatever, according to the provisions of section 122, Internal Revenue Code.

* * *

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) The petitioners were during all of the calendar year 1943 and ever since have been married and living together as husband and wife.

(b) At all times pertinent to, and for all taxable periods involved in, this proceeding the petitioners kept their accounts and filed their income tax returns on the cash receipts and disbursements basis of accounting and of returning their income for income taxation.

(c) On or before the fifteenth day of March, 1944, the petitioners filed a joint income tax return on the respondent's Form 1040 for the calendar year 1943 with the collector for the first district of California showing thereon a net liability for in-

come and victory taxes of $63.35, a prepayment of such liability by income and victory taxes of $134.32, withheld from the petitioner husband's wages and a refund of $71.46 of such taxes withheld due the petitioners, which refund was subsequently paid to the petitioners.

(d) On or before the fiftheenth day of March, 1946, the petitioners filed a joint income tax return on the respondent's Form 1040 for the calendar year 1945 with the collector for the first district of California showing thereon a net loss of $2,782.64 for the said calendar year and no income tax liability.

(e) During the calendar year 1945 the petitioners were in the business of operating a dairy farm in the Lodi district of San Joaquin County, California, which business had been begun by them in the year 1944. The said dairy business was conducted on a rented farm and the petitioners' herd of dairy cattle and the farming and dairy equipment necessary for the operation of the business had been bought on credit and the petitioners' debt for the purchase price of the cattle and equipment was secured by a chattel mortgage to the vendor, a farm machinery dealer, on the said cattle and equipment.

(f) During the calendar year 1945 the petitioners sustained a net loss of $2,601.39 in the operation of their dairy business, which loss is computed according to the following summary:

Receipts from product and services sold		$8,917.27
Receipts from sale of cattle		9,332.68
Receipts from sale of equipment		4,106.12
Total receipts		$22,356.07
Cost, less depreciation, of cattle sold	$13,831.50	
Cost, less depreciation, of equipment sold	4,181.60	
Rent and other operating expenses paid	6,944.36	
Total costs and expenses		24,957.46
Difference, net loss as above		$2,601.39

(g) The sales of equipment and cattle made at a loss by the petitioners during the year 1945 as shown in the summary in sub-paragraph (f) next above were forced sales made at the instance of the holder of the chattel mortgage on the property sold because the proceeds of the sale of produce of the dairy assigned to him to apply on the debt secured by the said mortgage were insufficient in amount to meet the agreed payments of interest and principal on the said debt.

(h) The petitioners filed on or about the fourteenth day of August, 1946, a valid and sufficient claim for refund of all the income and victory taxes assessed and paid or prepaid on their income

and victory tax return for the calendar year 1943 on the basis that the net loss described in subparagraph (f) next above was a net operating loss within the terms of section 122, Internal Revenue Code, which was allowable without change or adjustment as a net operating loss carry-back deductible in computing revised income tax net income and revised victory tax net income on the said return for the calendar year 1943; and the respondent has denied the said claim and refused to allow the claimed deduction because of his holding (assigned as error in this petition) "that the losses sustained * * * on the sale of dairy cattle and equipment in 1945 were not attributable to the operation of your dairy business."

* * *

Wherefore, the petitioners pray that this Court may hear the proceeding, and determine that the petitioners are not liable for any deficiency in income and victory taxes but, on the contrary, are entitled to a refund of an overpayment of such taxes in the amount of $63.35, for which a valid and proper claim for refund was filed within three years from the date petitioners' income and victory tax return for the calendar year 1943 was due to be filed and was filed.

/s/ FRANK C. SCOTT, C.P.A.,
Counsel for Petitioners.

State of California,
County of San Joaquin.

Ben A. Puente and Marion Puente, being first duly sworn, say, each for himself or herself, that they are the petitioners named in the foregoing petition, that they have read the foregoing petition, or had it read to them, and are familiar with the statements of fact contained therein, and that the statements of fact contained therein are true, except those stated to be upon information and belief, and that those they believe to be true.

/s/ BEN A. PUENTE,

/s/ MARION H. PUENTE.

Subscribed and sworn to before me this second day of September, 1949.

[Seal] /s/ D. R. EVICK,
Notary Public in and for the said State and County.

EXHIBIT A

Form 1279 (Rev. Mar. 1946)

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

June 8, 1949.

Office of Internal Revenue
Agent in Charge
San Francisco Division
IRA:90-D:HM
(C-TS:PD SF:ORM)

Mr. Ben A. Puente, and
Mrs. Marion Puente,
Husband and wife,
Route 2, Box 353,
Lodi, California.

Dear Mr. and Mrs. Puente:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of $199.08, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Wash-

ington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner.

By /s/ F. M. HARLESS,
Internal Revenue Agent
In Charge.

Enclosures:
Statement
Form 1276
Form Waiver

Statement

San Francisco
IRA:90-D:HM
(C-TS:PD SF:ORM)

Mr. Ben A. Puente, and
Mrs. Marion Puente,
Husband and wife,
Route 2, Box 353,
Lodi, California.

Tax Liability for the Taxable Year Ended December 31, 1943.

	Deficiency
Income and victory tax	$199.08

In making this determination of your income tax liability, careful consideration has been given to your protest filed May 17, 1948; to the statements made at the conferences held on July 1, 1948, and February 7, 1949, and to your claim for refund filed on August 14, 1946.

The claim for refund was filed on the basis that the net operating loss for the calendar year 1945 be allowed as a carry-back loss in 1943.

It is held that the losses sustained by you on the sale of dairy cattle and dairy equipment in 1945 were not attributable to the operation of your dairy business. Accordingly, they cannot be deducted from your gross income for 1943 as a net operating carry-back loss.

It is noted that you failed to compute surtax on surtax net income of $1,131.00 reported on page 4 of your 1943 return.

A copy of this letter and statement has been mailed to your representative, Mr. Frank C. Scott, P. O. Box 1904, Stockton, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Received and filed T.C.U.S. September 6, 1949.

Served September 7, 1949.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income and victory taxes for the calendar year 1943; that the petitioners have filed with the collector for the first district of California a claim for refund on or about the fourteenth day of August, 1946, which time of filing was less than three years from the date on which the petitioners' income and victory tax return for the calendar year 1943 was due to be filed and was filed. For lack of knowledge or information sufficient to form a belief, denies the

remaining allegations contained in paragraph 3 of the petition.

4.(a) and (b) Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

5.(b) Admits that petitioners filed their income tax return for the taxable year 1943 on the cash basis. For lack of knowledge or information sufficient to form a belief, denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

5.(c) and (d) Admits the allegations contained in subparagraphs (c) and(d) of paragraph 5 of the petition.

5.(e) Admits that during the calendar year 1945 the petitioners were in the business of operating a dairy farm in the Lodi district of San Joaquin County, California. For lack of knowledge or information sufficient to form a belief, denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

5.(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

5.(g) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

5.(h) Admits that the petitioners filed on or about the fourteenth day of August, 1946, a claim

for refund of all the income and victory taxes assessed and paid on their income and victory tax return for the calendar year 1943; and that the respondent has denied the said claim and refused to allow the claimed deduction because of his holding (assigned as error in this petition) "that the losses sustained * * * on the sale of dairy cattle and equipment in 1945 were not attributable to the operation of your dairy business." Denies the remaining allegations contained in subparagraph (h) of paragraph 5 of the petition.

* * *

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commisisoner's determination be approved and the petitioners' appeal denied.

/s/ CHARLES OLIPHANT, T.M.M.,
Chief Counsel, Bureau
of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
LEONARD ALLEN MARCUSSEN,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed T.C.U.S. October 4, 1949.

[Title of Tax Court and Cause.]

* * *

2. In the year 1945, the petitioners, operators of a dairy farm, sold their entire herd of cattle and their farming equipment and went out of business. They suffered a loss on these sales. Held, the loss suffered was not attributable to the operation of a trade or business regularly carried on by the petitioners and was therefore subject to the limitation provision of section 122 (d)(5) of the Internal Revenue Code in computing the amount of any net operating loss deduction under section 122. Joseph Sic, 10 T. C. 1096, affirmed 177 F. 2d 469, and Hartwig N. Baruch, 11 T. C. 96, affirmed 178 F. 2d 402.

Frank C. Scott, C. P. A.,
For the petitioners.

Leonard Allen Marcussen, Esq.,
For the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

The respondent determined a deficiency in the amount of $199.08 in income and victory taxes for the year 1943 against the petitioners. Petitioners contest that part of the deficiency which is attributable to the respondent's disallowance of the cost of certain work clothing claimed by the petitioners on their return as a deductible expense. It is petitioners' position, however, that no deficiency exists for the year 1943 and they claim an overpayment of

$63.35, the total 1943 income and victory taxes paid, by virtue of a claimed net operating loss deduction carried back from the year 1945, and they have made a claim for refund of this amount.

This case presents the following questions:

* * *

2. Is the loss which is suffered by a dairy farmer as the result of a sale of his herd of cattle and farm equipment in liquidation of his business a loss attributable to the operation of his dairy business and therefore not subject to the limitation of section 122 (d)(5) of the Code in computing the amount of a net operating loss deduction?

Findings of Fact

Part of the facts were stipulated and they are so found.

Petitioners, husband and wife, have their residence at Lodi, San Joaquin County, California. They duly filed a joint income tax return for the calendar year 1943 on a cash receipts and disbursements basis with the collector of internal revenue for the first district of California.

* * *

Petitioner, Ben A. Puente, was required to spend no less than $35 for special clothing or uniforms worn by him only while he was employed at the dairy, which clothing or uniforms were not adaptable to general and continued wear to the extent that they replaced his regular clothing, and this amount ($35) was an ordinary and necessary expense for carrying on a trade or business.

During the year 1945 petitioners were engaged in the business of dairy farming on a rented farm in the Lodi district of San Joaquin County, California. They had begun this business in the latter part of 1944. The petitioners' herd of dairy cattle and the farming and dairy equipment necessary for the operation of the business had been bought on credit and the petitioners' debt for the purchase price thereof was secured by a chattel mortgage thereon to the vendor, a farm machinery dealer. In the year 1945 forced sales were made of the petitioners' farming and dairy equipment and their entire herd of dairy cattle at the insistence of the holder of the chattel mortgage thereon. These sales resulted in a liquidation of their dairy business. Petitioners suffered a loss on such sales computed as follows:

	Adjusted Basis for Gain or Loss	Proceeds of Sale	Loss Suffered
Dairy cattle	$13,831.50	$9,332.68	$4,499.82
Farming and dairy equipment	4,181.60	4,106.12	75.48

The full amount of such losses was included by the petitioners in their computation of a net operating loss for the year 1945. They filed a claim for refund of all the income and victory taxes assessed and paid on their income and victory tax return for the calendar year 1943 on the basis that the net operating loss was computed in accordance with section 122 of the Code and was allowable as a net operating loss carryback for the year 1943. The respondent denied such claim.

OPINION

Hill, Judge:

* * *

The second issue concerns the right of the petitioners, in the computation of a net operating loss under section 122 of the Code, to the inclusion of the loss suffered by them on the sale of their dairy cattle and farm equipment as a deduction attributable to the operation of their trade or business. Pertinent provisions of section 122 of the Code read as follows:

Sec. 122. Net Operating Loss Deduction.

(a) Definition of Net Operating Loss. As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

* * *

(d) Exceptions, Additions, and Limitations. The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * *

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions, addi-

tions, and limitations specified in paragraphs (1) to (4) of this subsection.

Petitioners' counsel concedes, and we hold, that the issue presented herein is substantially the same as that in Joseph Sic, 10 T. C. 1096, affirmed 177 F. 2d 469, cert. denied March 13, 1950, and Hartwig N. Baruch, 11 T. C. 96, affirmed 178 F. 2d 402, decided by this Court in favor of the respondent. However, it is petitioners' contention that those cases were wrongly decided and they request us to re-examine the question on the basis of an analysis of the problem made by them in their brief. The arguments of the petitioners are substantially the same as those advanced in the two cases cited above, so that we deem it unnecessary to discuss them herein. We adhere to our previous rulings and hold that the losses on the sale of petitioners' farm equipment and dairy cattle, resulting in a liquidation of their business, did not constitute a deduction attributable to the operation of a trade or business regularly carried on by the petitioners and therefore the limitation of section 122 (d) (5) is applicable.

Decision will be entered under Rule 50.

Enter August 20, 1951.

Received August 14, 1951.

Served August 20, 1951.

The Tax Court of the United States
Washington

Docket No. 24820

BEN A. PUENTE and MARION PUENTE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Findings of Fact and Opinion entered August 20, 1951, both petitioner and respondent filed recomputations of tax, which recomputations agree in amount. It appearing that such recomputations are correct, it is, therefore,

Ordered and Decided: That there is a deficiency in income and victory tax for the year 1943 in the amount of $191.66.

/s/ SAMUEL B. HILL,
Judge.

Entered September 24, 1951.

Served September 26, 1951.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel that the following facts shall be taken to be true and received as evidence in the above-entitled proceeding, together with all exhibits attached hereto and made a part hereof, subject to the right of either party to object to any of the facts herein stipulated on grounds of irrelevancy and immateriality and to offer such additional evidence as may not be inconsistent herewith.

(1) The petitioners were during all of the calendar year 1943 and ever since have been married and living together as husband and wife.

(2) At all times pertinent to, and for all taxable periods involved in, this proceeding the petitioners kept their accounts and filed their income tax returns on the cash receipts and disbursements basis of accounting and of returning their income for income taxation.

(3) On or before the fifteenth day of March, 1944, the petitioners filed a joint income tax return on the respondent's Form 1040 for the calendar year 1943 with the collector for the first district of California showing thereon a net liability for income and victory taxes of $63.35, a prepayment of such liability by income and victory taxes of $134.32 withheld from the petitioner husband's wages, and a refund of $71.46 of such taxes withheld due the petitioners, which refund was subsequently paid to the petitioners.

(4) On or before the fifteenth day of March, 1946, the petitioners filed a joint income tax return on the respondent's Form 1040 for the calendar year 1945 with the collector for the first district of California showing thereon a net loss of $2,782.64 for the said calendar year and no income tax liability.

(5) During the calendar year 1945 the petitioners were in the business of operating a dairy farm in the Lodi district of San Joaquin County, California, which business had been begun by them in the year 1944. The said dairy business was conducted on a rented farm. The petitioners' herd of dairy cattle and the farming and dairy equipment necessary for the operation of the business had been bought on credit and the petitioners' debt for the purchase price of the cattle and equipment was secured by a chattel mortgage to the vendor, a farm machinery dealer, on the said cattle and equipment.

(6) During the calendar year 1945 the petitioners' gross receipts from farm produce sold and from wages amounted to $8,917.27; and their expenses for rent, feed, labor, supplies, depreciation, and other direct operating expenses amounted to $6,944.36.

(7) The petitioners received during the said year 1945 $9,332.68 from sales of dairy cattle used in their business of farming. The adjusted bases of the said dairy cattle for loss or gain on the sales amounted to $13,831.50.

(8) The petitioners received during the said year 1945 $4,106.12 from sales of equipment used in

their business of farming. The adjusted bases of the said equipment for loss or gain on the said sales amounted to $4,181.60.

(9) The sales of equipment and cattle made at a loss by the petitioners during the year 1945 as shown in the summary in sub-paragraphs 7 and 8 next above were forced sales made at the insistence of the holder of the chattel mortgage on the property sold.

(10) The petitioners filed on or about the fourteenth day of August, 1946, a claim for refund of all the income and victory taxes prepaid for the calendar year 1943 on the basis that they suffered a net operating loss for the calendar year 1945 within the meaning of section 122, Internal Revenue Code, which loss was claimed to be allowable without change or adjustment as a net operating loss carry-back deductible for the calendar year 1943. The respondent denied the said claim and refused to allow the claimed deduction because of his holding "that the losses sustained * * * on the sale of dairy cattle and equipment in 1945 were not attributable to the operation of your dairy business."

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

/s/ FRANK C. SCOTT,
Counsel for Petitioners.

Filed at hearing May 15, 1950.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

I.

Jurisdiction

Ben A. Puente and Marion Puente, your petitioners, respectfully petition this Honorable Court to review the decision of the Tax Court of the United States entered on September 24, 1951, and finding a deficiency in income and victory tax due from your petitioners in the amount of one hundred ninety-one and 66/100 dollars ($191.66).

Your petitioners, at the time of filing this petition, are citizens of the United States and reside at Route 1, Box No. 68-A, Wilton, California.

The income and victory tax return in respect of which the aforementioned tax liability arose was filed by your petitioners with the collector of internal revenue for the first district of California located in the city and county of San Francisco, State of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction in this Court to review the decision of the Tax Court of the United States aforesaid is based on Sections 1141 and 1142 of the Internal

Revenue Code (Title 26, United States Code) as last amended by Section 128 of the Act of May 24, 1949, (Public No. 72, 81st Congress, 1st Session).

II.

Nature of Controversy

During the calendar year 1945 your petitioners were engaged in the dairy farming business on a rented farm in the Lodi district of San Joaquin County, California. The petitioners' herd of dairy cattle and the farming and dairy equipment required for the operation of their said business had been bought on credit when the business was started late in 1944. The petitioners' debt for part of the purchase price thereof was secured by a chattel mortgage thereon to the vendor of the cattle and equipment. In the year 1945 forced sales were made of the petitioners' said equipment and dairy cattle at the insistence of the holder of the chattel mortgage thereon. The petitioners suffered losses on such sales as follows:

	Dairy Cattle	Equipment
Adjusted basis for gain or loss	$13,831.50	$4,181.60
Proceeds of sale	9,332.68	4,106.12
Loss suffered	$ 4,499.82	$ 75.48

The full amount of such losses was included in the petitioners' computation of a net operating loss for the year 1945 to be claimed as carry-back under

the provisions of Section 122, Internal Revenue Code. They accordingly filed a timely claim for refund of all the income and victory tax assessed and paid on their income and victory tax return.

The respondent Commissioner denied the claim. On his determination of a deficiency of $199.08 in income and victory tax on the petitioners' 1943 income and victory tax return on account of alleged errors in the return the petitioners filed a timely petition to the Tax Court of the United States for redetermination of the said deficiency and claimed therein the abatement of the deficiency determined and a refund of $63.35 on the ground that they were entitled to a deduction from their 1943 income of their net operating loss of $2,601.99, more or less, for the year 1945 as a carry-back to the year 1943.

In the memorandum opinion of the Tax Court of the United States in accordance with which the decision complained of herein is based the said Court denied the claimed net operating loss carry-back on the ground that the losses on the sale of the petitioners' farm equipment and dairy herd "did not constitute a deduction attributable to the operation of a trade or business regularly carried on by the petitioners." The petitioners' position is that such losses were, on the contrary, directly attributable to such a business.

III.

Assignment of Errors

In making its decision as aforesaid, the Tax Court of the United States committed the following er-

rors upon which your petitioners rely as the basis of this petition for review:

1. The said Court erred in failing and refusing to allow the deduction of a net operating loss carry-back from the year 1945 to the year 1943 in the amount of $2,601.39, more or less, according to the provisions of Section 122, Internal Revenue Code.

2. The said Court erred in holding "that the losses on sale of petitioners' farm equipment and dairy cattle, resulting in the liquidation of their business, did not constitute a deduction attributable to the operation of a trade or business regularly carried on by the petitioners."

IV.

Prayer

Wherefore, your petitioners pray that this Honorable Court may review the decision of the Tax Court of the United States and reverse and set aside the same and direct the said Court to enter a decision that there is an overpayment of $63.35 refundable to the petitioners; and for the entry of such further orders and directions as shall by this Honorable Court be deemed meet and proper in accordance with law.

/s/ LAFAYETTE J. SMALLPAGE,
Attorney for Petitioners.

State of California,
County of San Joaquin—ss.

Lafayette J. Smallpage, being duly sworn, says: I am the attorney for the petitioners in this proceeding, and prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge and belief. The petition is not filed for delay, and I believe that the petitioners are justly entitled to the relief sought.

/s/ LAFAYETTE J. SMALLPAGE.

Subscribed and sworn to before me this nineteenth day of December, 1951.

[Seal] /s/ HAZEL SMIKLE,
Notary Public in and for the
Said State and County.

Received and filed T.C.U.S. December 24, 1951.

[Title of Tax Court and Cause.]

PROOF OF SERVICE

To: Commissioner of Internal Revenue, Respondent, Washington 25, Dist. of Columbia.

Acting Chief Counsel, Bureau of Internal Revenue, Washington 25, Dist. of Columbia, Attorney for Respondent.

You Are Hereby Notified that on the 24th day of December, 1951, a petition for review by the United

States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause, was filed with the Clerk of the said Tax Court. A copy of the petition as filed is attached hereto and served upon you.

Dated December 24, 1951.

/s/ LAFAYETTE J. SMALLPAGE,
F.C.S.
Attorney for Petitioner.

Service of Copy acknowledged.
Filed T.C.U.S. December 28, 1951.

[Title of Tax Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the petition for review heretofore filed by the petitioners in the above-entitled cause, prepared and transmitted as required by law and by the rules of the said Court of Appeals, and to include in the said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Tax Court of the United States.

2. Pleadings before the said Tax Court as follows:

(a) Petition for redetermination;
(b) Answer of the respondent.

3. The memorandum findings of fact and opinion of the said Tax Court.

4. The decision of the said Tax Court.

5. The stipulation of facts filed on May 15, 1950.

6. The petition for review filed by the petitioners.

7. This praecipe.

/s/ LAFAYETTE J. SMALLPAGE,
F.C.S.
Attorney for Petitioners.

Received and filed T.C.U.S. December 26, 1951.

[Title of Tax Court and Cause.]

To Acting Chief Counsel, Bureau of Internal Revenue, Washington 25, Dist. of Columbia.

Please Take Notice that on the 26th day of Dec., 1951, the undersigned, attorney for Ben A. Puente and Marion Puente, the petitioners in the above-entitled cause, has filed with the Clerk of the Tax Court of the United States a Praecipe for Record, a copy of which is attached hereto.

Dated December 26, 1951.

/s/ LAFAYETTE J. SMALLPAGE,
F.C.S.
Attorney for Petitioners.

Receipt of Copy acknowledged.
Filed T.C.U.S. December 28, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Praecipe for Record" in the proceeding before the Tax Court of the United States entitled "Ben A. Puente and Marion Puente, Petitioners, v. Commissioner of Internal Revenue, Respondent," Docket No. 24820 and in which the petitioners in the Tax Court have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 10th day of January, 1952.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, the Tax Court of the
United States.

[Endorsed]: No. 13239. United States Court of Appeals for the Ninth Circuit. Ben A. Puente and Marion Puente, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed January 22, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13239

BEN A. PUENTE and MARION PUENTE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Now come the petitioners, Ben A. Puente and Marion Puente, by their attorney as undersigned and state that the points on which they intend to rely as to the relief sought in this proceedings are with reference to their petition for review hereinbefore filed with the Tax Court of the United States (Document No. 7 of the record transmitted by the said Tax Court) the assignments of error numbered 1 and 2 as set forth in Section III of the said petition for review.

The said petitioners designate as material to consideration of the review subject of this proceeding all of the record as certified and transmitted by the Clerk of the said Tax Court with the exception of the following described parts of Documents Nos. 2, 3, and 4, which are irrelevant and extraneous to the points at issue in this proceeding:

To omit from Document No. 2 (Petition to the Tax Court):

Paragraph 4 (b), the same being the first

paragraph beginning on page 3 of the said Petition;

Paragraph 5 (i), the same being the first paragraph beginning on page 7 of the said Petition; and

Pages 2 to 5 of "Statement" forming part of Exhibit A of the said Petition, the same being the last four pages of Document No. 2.

To omit from Document No. 3 (Respondent's Answer to the Tax Court):

Paragraph 5 (i), the same being the first paragraph beginning of page 3 of the said Answer.

To omit from Document No. 4 (Memorandum Findings of Fact and Opinion):

Item 1 of headnotes on page 1;

The third paragraph beginning on page 2 of this Document which reads: "1. is the cost if any," etc.

The first, second, third, and fourth paragraphs beginning on page 3 of this Document;

All of the matter on page 5 of this Document following the words "Hill, Judge:," including the footnote, and the first five lines of page 6 thereof.

The petitioners also designate as material to consideration of the review subject of this proceeding this Statement of Points and Designation of Record.

/s/ LAFAYETTE J. SMALLPAGE,
F.C.S.
Attorney for Petitioners.

[Endorsed]: Filed U.S.C.A. February 6, 1952.

No. 13,239

IN THE

United States Court of Appeals

For the Ninth Circuit

BEN A. PUENTE and MARION PUENTE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review a Decision of The Tax Court of the United States.

BRIEF FOR PETITIONERS.

LAFAYETTE J. SMALLPAGE,
Stockton Savings and Loan Bank Building, Stockton, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 13,239

IN THE

United States Court of Appeals

For the Ninth Circuit

BEN A. PUENTE and MARION PUENTE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review a Decision of The Tax Court of the United States.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASE.

This is a petition to review a determination of The Tax Court of the United States that there is a deficiency in income and victory tax for the year 1943 in the amount of $191.66 due from the petitioners. (R. 22.) The petition has been timely and properly filed in this Court of Appeals under the provisions of Sections 1141 and 1142 of the Internal Revenue Code (Pt. 1, 53 U. S. Stat. at L.; Title 26, U. S. Code), as last amended by section 128 of the Act of May 24, 1949 (Ch. 139, Sec. 128, 63 U. S. Stat. at L. 107; Suppl. IV, U. S. Code, 1946 Ed., p. 1317).

The memorandum findings of fact and opinion of The Tax Court, the pertinent parts of which are copied in the transcript of record, pp. 17-21, have been printed in full at 10 T.C.M. 735.

The deficiency asserted by the respondent Commissioner of Internal Revenue and confirmed by the decision of The Tax Court results from the refusal of the respondent to allow a timely filed claim for refund of all of the income and victory tax paid by the petitioners for 1943, which claim was based on a carryback under the provisions of Section 122, Internal Revenue Code, of a net operation loss of $2,601.99 sustained by them in the year 1945. The respondent's denial of the claim was based on his holding that the losses sustained by the petitioners on the sale of dairy cattle and equipment in 1945 "were not attributable" to the operation of their dairy business in that year. (R. 13, 15, 25.)

FACTS INVOLVED.

The facts pertaining to the issue in this case have been stipulated. (R. 23-25.) They are summarized as follows:

During the calendar year 1945 the petitioners were engaged in the dairy farming business on a rented farm near Lodi, California. The petitioners' herd of dairy cattle and the farming and dairy equipment required for the operation of their said business had been bought on credit when the business was started

late in 1944. Their debt for part of the purchase price thereof was secured by a chattel mortgage thereon to the vendor of the cattle and equipment. In the year 1945 forced sales were made of the petitioners' said cattle and equipment at the insistence of the holder of the chattel mortgage thereon. The sales resulted in losses of $4,498.82 and $75.48 on the cattle and equipment respectively in relation to the bases for loss or gain on such sales under the income tax law. The petitioners' ordinary receipts from farm produce sold and from wages for the year 1945 amounted to $8,917.27; and their expenses for rent, feed, labor, supplies, and other direct operating expenses, and allowable depreciation amounted to $6,944.36. The net profit from their dairy business, exclusive of the losses on the sales of cattle and equipment, is the difference between those sums, $1,972.91. Subtracting that profit from the total losses on the sale of cattle and equipment, $4,574.30 ($4,498.82 plus $75.48), there is obtained the net loss of $2,601.39 claimed by the petitioners as a net operating loss for 1945 according to the provisions of Section 122, Internal Revenue Code. (R. 23, 24; Cf. Par. (f) of petition to The Tax Court, R. 7.)

QUESTION PRESENTED.

Only a single question of law is presented on this petition for review, namely:

> Are the petitioners entitled to a deduction of $2,601.39 on their 1943 income tax return by

reason of a net operating loss sustained for the calendar year 1945 under Section 122, Internal Revenue Code?

The essential facts in the computation of the claimed loss, including the fact that "the petitioners were in the business of operating a dairy farm" during the year 1945, have been stipulated. The determination by The Tax Court of that question adverse to the petitioners hinges on the interpretation of the phrase "not attributable to the operation of a trade or business" contained in Section 122(d)(5) of the Internal Revenue Code, which section excludes, in effect, a "carry-back" or "carry-over" produced by deduction "not attributable to the operation of a trade or business regularly carried on by the taxpayer." The petitioners' position is that their losses on the sales of cattle and equipment in 1945 were fully "attributable" to the operation of their dairy farm.

ARGUMENT.

In their argument the petitioners propose to show:

I. The modification by the Revenue Act of 1942 of the operating loss deduction to include "carry-backs" of losses was a relief measure to be construed liberally in favor of taxpayers.

II. The history of the net operating loss provisions of the income tax law indicates no intention to exclude from the "net operating loss" losses incurred in the disposal of assets used in the trade or business.

III. The terms of Section 122, Internal Revenue Code, do not provide or imply that losses incurred in the disposal of assets used in the trade or business shall be excluded in computing a net operating loss.

IV. The terms of Section 122, Internal Revenue Code, do not require or imply that losses of individuals from disposal of property used in trade or business be treated differently from such losses by corporations.

INTRODUCTION.

As noted in the opinion below (R. 21) the issue in this case is substantially the same as those in cases decided adversely to the taxpayers, as follows:

Sic v. Commissioner of Internal Revenue, 177 F. (2d) 469 (C. A. 8, 1949), affirming 10 T. C. 1096; cert. den. Mar. 31, 1950; and

Baruch v. Commissioner of Internal Revenue, 178 F. (2d) 402 (C. A. 2, 1949), affirming 11 T. C. 96;

to which cases may be added two more:

Lazier v. United States, et al., 170 F. (2d) 521 (C. A. 8, 1948), affirming 77 F. Supp. 241; and

Pettit v. Commissioner of Internal Revenue, 175 F. (2d) 195 (C. A. 5, 1949).

In asking this Court of Appeals to review a question which has been answered adversely to the petitioners' contentions by three other Courts of equal

rank it behooves the petitioners to explain at the outset their reasons for going against such an apparently imposing array of precedents on the respondent's side. Those reasons are, in brief, as follows:

I. The opinions in the decided cases listed above are, in their obvious effect, contrary to the manifest policy of the Congress in enacting the net operating loss provisions of the income tax law. (Sec. 122, Internal Revenue Code.) This point will be elaborated on in the arguments under propositions I and II below.

II. These opinions, on analysis, appear to be based, in a "follow-the-leader" down a path of least resistance pattern, on two fallacious opinions of lesser authority, one the opinion of Judge Leech in *Joseph Sic,* 10 T. C. 1096, and the other that of an anonymous author of I. T. 3711, a ruling of the Bureau of Internal Revenue, printed in Cumulative Bulletin 1945 at page 162. In none of the four opinions is there evidence of any critical analysis of those two opinions accepted as basic authority. In the earliest Court of Appeals opinion, Lazier, *supra,* the affirmation of the District Court's findings was stated to be primarily on the basis of Judge Leech's opinion in 10 T. C. 1096 and the ruling in I. T. 3711, *supra.* There was no probing of the premises of those opinions but there was an expression of considerable doubt as to the correctness of the Tax Court decisions following the *Sic* case, 10 T. C. 1096. The affirmation of the District Court's findings was explicitly because of the Court's reluctance to depart from The Tax Court's doctrine. In the same Court's consideration of the same ques-

tion in the *Sic* case, 177 F. (2d) 469, its following of its prior decision in Lazier was automatic.

The Court of Appeals for the Fifth Circuit likewise expressed its doubts of the correctness of its action in the *Pettit* case, 175 F. (2d) 195, but preferred to go along with the opinion of the Court for the Eighth Circuit in the *Lazier* case. The Court of Appeals for the Second Circuit affirmed The Tax Court in the *Baruch* case, 178 F. (2d) 402, in a *per curiam* opinion on the authority of the *Lazier* and *Pettit* cases.

In view of these reasons it is urged upon this Court that the force of precedent in the cited cases is much weaker than it seems on reading the list of them, and weaker, too, than the interests of thousands of taxpayers whose losses in business are more often than not complicated with losses on the disposal of the assets by means of which their businesses are conducted. The most earnest consideration of the Court of the following arguments is bespoken in their interest.

I. THE MODIFICATION BY THE REVENUE ACT OF 1942 OF THE OPERATING LOSS DEDUCTION TO INCLUDE "CARRY-BACKS" OF LOSSES WAS A RELIEF MEASURE TO BE CONSTRUED LIBERALLY IN FAVOR OF TAXPAYERS.

In the enactment of the Revenue Act of 1942, which first of the wartime revenue measures increased the rates of tax on both individuals and corporations to the highest levels in the history of the income tax

law, the Congress saw fit in obvious consideration of the semiconfiscatory effect of the high rates to include a record number of relief provisions for a single revenue law. Principal of such provisions were as follows:

Sec. 120, alimony and separate maintenance payments deductible by payor and taxable to payee;

Sec. 127, allowance of medical, dental and similar expenses;

Secs. 150 and 151, capital gains treatment of gains from involuntary conversions and sales of property (depreciable assets and land) used in business, with full deduction for losses therefrom;

Sec. 153, provisions for carry-backs of net operating losses;

Sec. 156, liberal provisions for allowance of war losses.

Similar provisions were made in the excess-profits tax provisions of the Internal Revenue Code with respect to excess-profits credit carry-backs and carry-overs (Sec. 204 of the Act) and by the liberalization of the relief provisions of Section 722 and adding relief provisions for other special cases by Section 736 (Sec. 222 of the Act).

The statutory allowances of carry-overs of net operating losses, a history of which is sketched in the argument on Proposition II below, have always been

in the relief provision class, but with the advent of the unprecedented high tax rates and low exemptions of the Revenue Act of 1942 the expansion of the scheme of such allowances to provide carry-backs as well as carry-overs was a doubling of the relief provision attributes of the modified Section 122 of the income tax law.

In the report of the Senate Finance Committee on the provisions of the bill which was enacted as Section 153 of the Revenue Act of 1942 (Senate Report No. 1631, 77th Congress, 2d Session, C. B. 1942-2, p. 504) it is stated (p. 547, C. B. 1942-2):

> "To afford relief in these hardship cases, where maintenance and upkeep expenses, must, because of wartime restrictions be deferred to peacetime years, your committee has provided a 2-year carry-back of operating losses and of unused excess-profits credit. This provision affords, in effect, the same type of relief in periods of declining profits which the present 2-year carry-forward of operating losses and unused excess-profits credits affords in periods of increasing profits."

As a relief measure Section 122 should, as Justice Robb said in *Burnet v. Marston,* 57 F. (2d) 611 (C. A. D. C. 1932), of its predecessor, Section 204 of the Revenue Act of 1921, "be construed liberally in favor of the taxpayer to give the relief it was intended to provide", which statement was made on the authority of *Bonwit Teller & Co. v. United States,* 283 U.S. 258 (1931) 263, 51 S. Ct. 395, 397, 75 L. Ed. 1018, and four other Supreme Court cases.

II. THE HISTORY OF THE NET OPERATING LOSS PROVISIONS OF THE INCOME TAX LAW INDICATES NO INTENTION TO EXCLUDE FROM THE "NET OPERATING LOSS" LOSSES INCURRED IN THE DISPOSAL OF ASSETS USED IN THE TRADE OR BUSINESS.

The first provision the income tax law made for an allowance of a net loss from business operations in a year other than that in which it was sustained was that of Section 204(a) of the Revenue Act of 1918 for a carry-back from 1919 to 1918 of (1) losses incurred in the operation of any business and (2) losses on the sale in 1919 of real estate, manufacturing plants, machinery, or other facilities for production of war materials acquired on or after April 7, 1917. The Act also contained a provision of similar effect with respect to 1919 inventory losses. The Revenue Act of 1921 provided in Section 204(a) for carry-over to two subsequent taxable years of losses incurred in the operation of a trade or business "including losses sustained from the sale or other disposition of real estate, machinery and other capital assets used in the conduct of such trade or business". The Revenue Acts of 1924, 1926, and 1928, defined the term "net loss" with reference to the excess of deductions allowed by the income tax law over the gross income with exceptions for (1) non-business deductions in excess of non-business income, (2) capital losses in excess of capital gains, and (3) discovery or percentage depletion in excess of depletion on cost; and (4) with the inclusion in gross incomes, for the purpose of the definition, of tax-free interest received in excess of non-deductible interest paid to carry tax-

free securities. (Secs. 206, Acts of 1924 and 1926; Sec. 117, Act of 1928.)

The administrative interpretation and policy with respect to the provisions of these Acts is indicated from the introductory paragraph of Art. 651, Regulations 74 (Cf. Art. 1601, Regulations 62; Arts. 1621, Regulations 65 and 69), reading, as first approved, as follows:

> "The term 'net loss' as used in section 117 applies to a net loss during the taxable year in a trade or business regularly carried on by the taxpayer. *Included therein are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business.* See section 101 and article 503 with reference to the deduction of capital net losses. In order to be entitled to claim an allowance for a 'net loss' the taxpayer must have suffered an actual net loss in a trade or business during the taxable year. The amount properly allowed may be neither the loss reflected by the return filed for the purpose of the income tax nor the net loss shown by the taxpayer's profit and loss account, but is to be computed according to the Act." (Emphasis supplied.)

The Revenue Act of 1932 had a similar provision for a loss carry-over limited to one year after the year of the operating loss, but it never became effective due to its repeal by the National Industrial Recovery Act.

These predepression loss carry-over provisions of the income tax law were given acute consideration

in the leading case of *Edgar L. Marston,* 18 B. T. A. 558 (1929), affirmed *sub nom. Burnet v. Marston,* 57 F. (2d) 611 (C. A. D. C. 1932). That litigation involved losses by members of a security banking and brokerage partnership in 1922 with respect to partnership obligations and guarantees entered into prior to the winding up of the partnership business in 1920. The decision of the Board of Tax Appeals, affirmed on the Commissioner's petition for review, established the rule that a deductible "net loss" might be incurred in some year when the taxpayer was not actually engaged in the business, provided the loss was "attributable" to a business regularly carried on in some prior year. The affirmance in this case by the Court of Appeals of the District of Columbia was followed by the amendment of the provisions of Art. 651, Regulations 74, as quoted above, to make the first sentence read:

> "The term 'net loss' as used in section 117 applies to a net loss sustained during the taxable year and resulting from the operation of any trade or business regularly carried on by the taxpayer during the taxable year or any prior taxable year."

and to the striking out of the fourth sentence. (T. D. 4349, C. B. XI-2, p. 117, approved August 15, 1932.) The corresponding articles of prior regulations back to Regulations 62, as cited above, were similarly amended by the same Treasury Decision.

When the operating loss carry-over provisions were restored to the income tax law by the addition of

Section 122 to the Internal Revenue Code by Section 211 of the Revenue Act of 1939, they were advertised by the report of the Committee on Ways and Means (Report No. 855, 76th Congress, 1st Session, C. B. 1939-2, p. 504) as following the pattern of the provisions of the Revenue Act of 1928, in the following language (p. 508, C. B. 1939-2):

> "In the interest of equity, the committee, in the bill as reported, has recommended an amendment under which individuals and partners are allowed a 2-year carry-over of losses. This carry-over is substantially the same as that which was granted to them under the Revenue Act of 1928."

The bill as referred to the committee had provided for the carry-over of losses only in the returns of corporations.

The amendments of the provisions of this section of the Internal Revenue Code by the Revenue Act of 1942 to permit carry-backs as well as carry-overs of operating losses are negative of any change in the motivation of this legislation. These amendments were not in the bill which became the Revenue Act of 1942 as it passed in the House of Representatives, but were added by the Senate Finance Committee. Compare its report (Senate Report No. 1631, 77th Congress, 2d Session, C. B. 1942-2, p. 504) at pp. 546, 547, C. B. 1942-2, where the provision of a loss carry-back provision is characterized as a relief provision, and at pp. 596, 597, C. B. 1942-2, where the detailed discussion of its provisions is utterly negative of any indication of legislative intent to limit or restrict the

former provisions for the carry-over of net operating losses.

The language of the provisions of Section 122, Internal Revenue Code, when compared with that of the corresponding provisions of Section 117, Revenue Act of 1928, the last predepression operating loss deduction enactment, shows no change indicative of any difference of legislative intent. As will be shown in the argument below under Proposition III, the diversity of interpretation had its origin to a marked extent, in an attempt, quite successful to this date, on the part of the Bureau of Internal Revenue to pervert the intent of the Congress to its own theory of how much relief should be accorded to a taxpayer who has suffered a loss in his trade or business.

III. THE TERMS OF SECTION 122, INTERNAL REVENUE CODE, DO NOT PROVIDE OR IMPLY THAT LOSSES INCURRED IN THE DISPOSAL OF ASSETS USED IN THE TRADE OR BUSINESS SHALL BE EXCLUDED IN COMPUTING A NET OPERATING LOSS.

If the position of the respondent, as stated in his statutory notice, "that the losses sustained * * * on the sale of dairy cattle and equipment in 1945 were not attributable to the operation of your dairy business" (Cf. Stip. 10) is to be justified in the terms of the statute such justification must be found in Section 122(d)(5), Internal Revenue Code, which reads, in part:

> "(5) Deductions otherwise allowed by law *not attributable* to the operation of a trade or busi-

> ness regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the gross income not derived from such trade or business." (Emphasis supplied.)

The comparable provision of the last of the predepression Revenue Acts is shown by Section 117(a)(1) of the Revenue Act of 1928, which reads:

> "(1) Non-Business Deductions: Deductions otherwise allowed by law *not attributable* to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business." (Emphasis supplied.)

Obviously the meaning and application of the limitation of deductions in the case of each statute are determined by the words "not attributable". A dictionary definition of the verb "attribute" is "to ascribe by way of cause, inherent quality, interpretation, authorship, or classification" (Webster's Collegiate Dictionary, Fifth Edition), a term of causation nearly, if not quite, as general in its significance as "relate" or "refer", and more general than "ascribe" or "impute". If the words "attributable" and "attribute" have not acquired some special and technical meaning in connection with income tax law (and diligent search of Court decisions indicates no such modification of its meaning), any holding that the loss which a taxpayer may sustain on the sale of the assets used in a trade or business (usually

the very means which make the business possible) are not to be considered "attributable" to the carrying on of such trade or business renders that crucial word devoid of all significance in the application of the limitation in question.

In the interpretation of the corresponding provision of the predepression net operating loss carryover provisions the Bureau of Internal Revenue has stated very plainly in the paragraph of Art. 651, Regulations 74, quoted above, that "included therein [the term "net loss"] are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business". In the new dispensation of the Bureau with respect to substantially similar provisions of the current statute, Section 122(d)(5), Internal Revenue Code, we find its position stated in the last paragraph of a ruling primarily on the elements of a taxpayer's return for 1944, I. T. 3711, C. B. 1945, p. 162, in the following words:

> "Although it is determined that the property upon the sale of which the loss was sustained was used in A's business of managing and operating income-producing real estate, the loss from the sale thereof is 'not attributable to the operation of a trade or business regularly carried on by the taxpayer' within the purview of section 122(d)(5) of the Code supra, since she was not a regular trader or dealer in real estate. In other words, as supported by the facts here presented, the only business *regularly* carried on by A was managing and operating her income-producing

> real estate and not trading or dealing in real estate; the property was held primarily for use, rather than for sale, in her business; and the loss did not arise or result from the operation of such business but upon the disposition of assets used therein."

Since that paragraph has been assigned the character of Holy Writ, for all intents and purposes, in the opinion in *Lazier v. United States et al., supra,* which was the sole authority cited for the affirmance by the Court of Appeals for the Fifth Circuit in the *Pettit* case, *supra,* and was a leading authority in the *per curiam* affirmance of the *Baruch* case, *supra,* it is appropriate here to look critically at the *rationale* of that low ranking, but potent, ruling, to see whether its conclusion really carries the weight of authority that has been ascribed to it.

I. T. 3711 involved a situation in which the taxpayer managed and operated numerous real estate properties as a source of income. In 1944 she sold several of the properties, with a net loss for the year resulting from the sales. The Bureau ruled that the loss was fully deductible as an ordinary loss for 1944 under the provisions of Section 117(j), Internal Revenue Code, but ruled in the paragraph quoted above that the loss from the property sales, though "ordinary", could not be used in computing an operating loss carry-over.

This ruling contains no reasoning or analysis of the statute to support this distinction made for the

first time. It simply asserts the proposition and cites six decisions, letting it go at that. Not a single one of the decisions supports the ruling. These decisions will be considered in the order cited in the ruling.

In *Slack v. Commissioner,* 35 B. T. A. 271 (1937), the taxpayer sustained a loss on the sale of real estate in 1929, and sought to include this as a "net loss" under Section 117 of the Revenue Act of 1928. That section permitted the inclusion of capital losses of non-corporate taxpayers only to the extent of capital gains. The Board sustained the Commissioner in excluding this loss *on the ground that it was a capital loss,* since under the evidence the property was not "held by the taxpayer primarily for sale in the course of his trade or business" within the terms of Section 101(c)(8) of the Act of 1928 defining capital assets.

The Board in the *Slack* case made no distinction between continued "operation" of a business and its liquidation, and to this extent the decision negatives the existence of such a distinction.

In the next case cited in I. T. 3711, *McNeir v. Commissioner,* 30 B. T. A. 418 (1934), the Board sustained the Commissioner in excluding a loss resulting from the worthlessness of stock in a realty company owning a hotel, in computing a net loss. No distinction whatever was made between "operation" and "liquidation". The Board held that the taxpayer was not engaged in a trade or business at all, so far as the property was concerned, but that the transaction was an isolated one which, even along with

others, did not amount to a trade or business. The Board said (at p. 420):

> "In the present case we are unable to find from the evidence that petitioner engaged in the trading of property with any intention of making a profit, and so we are unable to conclude that his trading amounted to a trade or business within the meaning of the taxing statute."

I. T. 3711 next cites *Estate of Green v. Commissioner,* 27 B. T. A. 1195 (1933). In this case a testamentary trust holding property for income and reinvestment in 1923 received the redemption price of a number of securities, sold some stock and sold two mortgages and one parcel of land. In excluding a loss on these transactions for purposes of computing a net loss under Section 204(a) of the Act of 1921, the Board held that the trust was simply an investor and not engaged in business atall. The Board said (at p. 1197) that the purpose of the trust was

> "* * * to conserve the estate corpus for ten years, and to protect it from the hazards of business enterprise. The whole tenor of the instrument distinctly negatives any idea that the estate should regularly carry on a business for profit, and the evidence shows, we think, that none was carried on."

Far from suggesting a distinction between the continued conduct and "sale" or "liquidation" of a business, the Board said (at p. 1196) that the question was "whether the petitioner was engaged in a trade

or business regularly carried on." In stating the question the Board omitted the word "operation", upon which the Commissioner relies here, although it was in the statute. This completely negatives any support for the distinction now sought to be made.

The next case cited by I. T. 3711 is *Anderson v. United States,* 48 F. (2d) 201 (C. C. A. 5th, 1931). Here the taxpayer sustained a loss from the failure of a company in which he had invested, lending it more money as its business declined. Upon the clear evidence the Court held that he had simply sustained an investment loss and was not engaged in business at all, pointing out (at p. 202) that the statute "was not intended to apply to isolated or occasional losses such as here shown."

The fifth case cited by I. T. 3711 is *Pabst v. Lucas,* 36 F. (2d) 614 (D. C. App. 1929). Here too, the asserted net loss was based on miscellaneous personal losses, personal loans, contributions, and investment losses. These were disallowed for obvious reasons, no evidence of a regular business being present.

The final case cited by I. T. 3711 is *Lloyd v. Commissioner,* 32 B. T. A. 887 (1935). Here the inclusion of losses on sales of real estate was allowed in computing a net operating loss. It thus fails to support any argument for exclusion. On the contrary, in commenting on Section 117(a)(1) of the 1928 Act (same as the present Section 122(d)(5) of the Code) the Board said (at p. 891):

> "If the loss results from *or is incidental* to the operation of a trade or business regularly carried on by the taxpayer, it is sufficient to bring it within the net loss provisions of the statute." (Emphasis supplied.)

Far from supporting a distinction between "operation" and "sale" of a business, this quotation points out that a loss *incidental* to the operation of a business may be included. In a very real sense it can be said that the sale of assets used in business, a possibility inherent in the conduct of any business, is certainly at least "incidental" to its operation.

The foregoing analyses of the cases cited by the draftsman of I. T. 3711 emphasize the fallacious nature of his conclusion rather than support such conclusion. The first five such cases involve the exclusion of losses on stocks or similar investments, or bad debt losses, which the Board of Tax Appeals, or other trial Court, had held, as matters of primary fact, to be not attributable to any business regularly carried on by the taxpayers involved. In each case the exclusion was justifiable as a simple point of classification on the basis of evidence or stipulations, and in none of them did the opinions overrule to the slightest extent the provisions of Art. 651, Regulations 74 (quoted in our argument under Proposition II above), or the corresponding provisions in Art. 1621, Regulations 69 and 65, or in Art. 1601, Regulations 62, either directly or by implication.

Also there is pointedly omitted from I. T. 3711 any reference to the leading case on the exclusion of casual

and unrelated investment and bad debt losses, *Dalton v. Bowers,* 287 U. S. 404 (1932), 53 S. Ct. 205, 77 L. Ed. 389, or the same case in the lower Court, 56 F. (2d) 16 (C. C. A. 2, 1932). The reason for such avoidance is, we may surmise, found in the reference in each of those opinions to the provisions of Art. 1621, Regulations 65, the words of which we have quoted above as from Art. 651, Regulations 74, and the actual quotation at 56 F. (2d) 18 of a part of the sentence which we have quoted above. To have called attention to that sentence would have weakened the specious thesis of I. T. 3711 that Section 122(d)(5), Internal Revenue Code, means something different from what it plainly says.

We have taken so much time to expose the fallacy of *non sequitur* into which the draftsman of I. T. 3711 fell in his zeal to advance a new dispensation by the Bureau of Internal Revenue in the matter of its administration of the relief measures of Section 122, I. R. C., because of the importance his conclusions have assumed in the opinions of three Circuit Courts of Appeal on the question there involved, as well as the close parallel to those conclusions found in the other basic ruling on the question in the Tax Court's opinion, by Judge Leech, in *Joseph Sic,* 10 T. C. 1096. In that very brief opinion Judge Leech has, by a somewhat different process, as we shall show below, justified the conclusion of I. T. 3711 to an equally fallacious result.

Admitting that Section 122(d)(5), I. R. C. "does not materially differ from the language contained in

Section 206 of the Revenue Act of 1924" (p. 1098), the opinion goes on to cite *Dalton v. Bowers, supra,* in support of the exclusion of the taxpayer's loss from the sale of farm land. In so doing Judge Leech completely overlooked the Circuit Court's ratification of the Commissioner's interpretation of the clause "attributable to the operation of a business regularly carried on" in Art. 1651, Regulations 65, quoted with approval in the Circuit Court's opinion at 56 F. (2d) 18, and the inferential approval of that ratification in the Supreme Court. Instead of being a precedent and authority for the Bureau's new dispensation interpretation of the similar clause in Section 122(d)(5), *Dalton v. Bowers, supra,* was just about as squarely on the other side as it could possibly be. The opinion not only ignores the plain words of the Commissioner's interpretation of the crucial clause in all of the pre-depression regulations down to Art. 651, Regulations 74, but it cites as authority for a contrary finding as to what that interpretation was a case which in the Circuit Court stage thereof specifically ratified and approved the language of the Regulations.

This opinion of Judge Leech and that of the anonymous draftsman of I. T. 3711 are unfortunately the twin pillars of the doctrine exemplified by the cited opinions of the Courts of Appeals for the Eighth, Fifth, and Second Circuits in the *Lazier, Sic, Pettit,* and *Baruch* cases, *supra;* and how flimsy support they turn out to be on examination of the materials of

which they are constructed! In the light of our showing here of the deficiencies of those basic opinions it is respectfully submitted that this Court of Appeals should disregard the precedental character of those cases and render its decision according to the clear intent of the Congress in enacting Section 122 of the Internal Revenue Code.

IV. THE TERMS OF SECTION 122, INTERNAL REVENUE CODE, DO NOT PROVIDE OR IMPLY THAT LOSSES OF INDIVIDUALS FROM DISPOSAL OF PROPERTY USED IN TRADE OR BUSINESS BE TREATED DIFFERENTLY FROM SUCH LOSSES BY CORPORATIONS.

Section 122(d)(5) is explicitly applicable to individuals only and not to corporations. Was it the intention of the Congress to allow carry-over liquidation losses of corporations while not allowing them to individuals in business? The right of corporations to carry-overs and carry-backs of losses resulting in the liquidation of its assets and winding up of its affairs has been clearly determined by the Tax Court in the cases of *Northway Securities Co.*, 23 B. T. A. 532 (1931), and *Acampo Winery and Distilleries, Inc.*, 7 T. C. 629 (1947), which decisions have been formally acquiesced in by the respondent. Thus it is clear that the Bureau of Internal Revenue's contrary new dispensation with respect to individuals is not based on any broad concept of tax law as to the function of loss carry-overs and carry-backs but is limited to the interpretation of the language of the statute itself.

It hardly requires argument to show that there is nothing in the distinctions under the income tax law between individuals and corporations which should lead to their different treatment in this respect. Nor is there anything in the Code itself to suggest a reason for such different treatment.

The reason for the application of the limitations in Section 122(d)(5) only to individuals is presented very simply in Section 23 of the Code, which section provides generally for all deductions from gross income, including in Section 23(s) the deduction of net operating losses, the provisions of Section 122 merely providing the definitions, limitations, and prescription for computation of such losses in implementation of Section 23(s). Under Section 23(f) all losses of corporations are specifically treated as business losses. Under Section 23(e), however, individuals have their losses classified into three classes, viz., (1) those "incurred in trade or business", (2) those "incurred in any transaction entered into for profit, though not connected with the trade or business", and (3) those "of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft." The first class is set off from the other two by the exceptions in the definitions in the latter of losses or property "not connected with the trade or business". The implication is clear that the intent of Section 122(d)(5) is to make the same distinction between losses incurred in and connected with the trade or business

and those otherwise incurred or suffered. It was exactly that distinction carried through the relief provisions of Section 117(j) of the Code that led the draftsman of I. T. 3711 to conclude that the taxpayer's losses in that case were deductions from her ordinary income for the year sustained, and it was his blindness to it which led to his fallacious conclusion that they were to be excluded in the computation of a net operating loss.

If, within this classification of losses allowable to individuals, there was anything peculiar to losses resulting from the sale of property used in a business, which justified their exclusion in computing a net operating loss, the peculiarity would be one equally applicable to corporations and to individuals. Permitting them for corporations demonstrates that the only limitation intended in Section 122(d)(5) was to exclude individual losses "not connected with the trade or business".

It has been stipulated in this proceeding that the petitioners were in the business during 1944 and 1945 of operating a dairy farm. (Stip. Par. (5), R. 24.) The cattle and farm equipment subject of the losses here in question can hardly be said to have been acquired, owned, kept, sold, or otherwise disposed of, in transactions "not connected with the trade or business" so as to take losses pertaining to them out of the classification of Section 23(e)(1), "of losses incurred in trade or business", and to put them in either of the classifications of Section 23(e)(2) or 23(e)(3).

The foregoing exposition of the bases of distinction of the different kinds of losses, like our analysis in the argument under Proposition III above of the basic principles affecting the construction of Section 122(d)(5), demonstrates the wholly artificial and non-statutory character of the asserted distinction between losses in the continued operation of a business and those in the liquidation and winding up thereof. In the decided cases in which the distinction has been made and sustained, the logically and legally weak reasons for the distinction have always been clinched by a finding that the taxpayer was not in the "business regularly carried on" of selling out his property, i.e. dealing in fixtures, in real estate, farm equipment, etc., a finding that is sophistic and unrealistic to the *n*th degree, as if such a "finding" could in any wise alter the obvious fact that losses sustained in such final acts of winding up a business were most positively "connected with" and "attributable to" the conduct of the business. The artificial character of the asserted distinction is confirmed by the commercial and economic reality that the sale or liquidation, be it at a loss or at a profit, is an integral part, albeit the concluding step, of the business operation. The respondent would not question the repeated occurrence of a net operating loss in successive years in a losing business so long as the business continued. The taxpayer might continue to conduct such a business, losing more each year until its value had been reduced to *zero*. Should he be treated less favorably because,

after some years of losses, he come to his senses and gets the misery over with by selling out?

From a business point of view the final sale cannot be isolated because, as a practical matter, it represents the final culmination and realization of factors of the continued operation at a loss. In this sense the sale at a loss is directly incidental to and, in the language of Section 122(d)(5), "attributable" to such operation. In another connection, that of the interpretation of the distinction between "business bad debts" and "non-business bad debts" in Section 23(k), I. R. C. (new with the Revenue Act of 1942), the respondent advances the very opposite concept, in Section 29.23 (k)-6, Regulations 111, in instance (6) with reference to an example of A, engaged in the grocery business, extending credit on open account to B in 1941 (at the bottom of page 122, Treasury Department print), which reads:

> "(6) In 1942, A, *in liquidating the business,* attempts to collect B's claim but finds that it has become worthless. A's loss is not controlled by the non-business debt provisions, since *a loss incurred in liquidating a trade or business is a proximate incident to the conduct thereof.*" (Emphasis supplied.)

It is only fair to individuals in the Bureau service, such as the draftsman of I. T. 3711, who have a different view of what is "connected with", "attributable to", or "proximately incident to" the conduct of business, that this entire example is not original

with the Bureau but has been copied *verbatim* from the related reports of committees of the Congress, a fact which does not, however, weaken its import.

CONCLUSION.

In view of our showing above (1) that the modification by the Revenue Act of 1942 of the operating loss deduction to include "carry-backs" of losses was a relief measure to be construed liberally in favor of taxpayers, (2) that the history of the net operating loss provisions of the income tax law indicates no intention to exclude from the "net operating loss" losses incurred in the disposal of assets used in the trade or business, (3) that the terms of Section 122, Internal Revenue Code, do not provide or imply that losses incurred in the disposal of assets used in the trade or business shall be excluded in computing a net operating loss, and (4) that the terms of that section further do not require or imply that losses of individuals from disposal of property used in trade or business be treated differently from such losses of corporations, it is prayed that this Court of Appeals may reverse the finding of the Tax Court that no loss carry-back from 1945 is valid to eliminate the petitioners' income and victory tax liability for 1943. This prayer is made notwithstanding the force of precedents in opinions of Courts of Appeals for the Fifth, Eighth, and Second Circuits because of the demonstrated weakness of those precedents on anal-

ysis of their foundation on a Bureau ruling, I. T. 3711, and on the opinion of Judge Leech of the Tax Court in *Joseph Sic,* 10 T. C. 1096, the fallacies of which ruling and opinion are exposed above.

Dated, Stockton, California,
April 14, 1952.

Respectfully submitted,
LAFAYETTE J. SMALLPAGE,
Attorney for Petitioners.

No. 13239

In the United States Court of Appeals for the Ninth Circuit

BEN A. PUENTE and MARION PUENTE, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

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Special Assistants to the Attorney General.

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OPINION BELOW

The Tax Court's memorandum findings of fact and opinion (R. 17-21), entered August 20, 1951, are not reported.

JURISDICTION

The petition for review (R. 26-30) involves a deficiency in income and victory taxes determined by the Commissioner against the taxpayers, Ben A. Puente and Marion Puente, for the taxable year 1943. On June 8, 1949, the Commissioner mailed the taxpayers a notice of deficiency in such taxes for that year. (R. 5,

11-14) Within 90 days thereafter and on September 6, 1949, the taxpayers filed a petition with the Tax Court of the United States for a redetermination of the deficiency for the taxable year 1943 (R. 3), under Section 272(a)(1) of the Internal Revenue Code. The decision of the Tax Court that there is a deficiency in income and victory tax for the year 1943 in the amount of $191.66 was entered September 24, 1951 (R. 22), and the case is brought to this Court by a petition filed December 24, 1951 (R. 4, 26-30), under the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the taxpayers sustained a net operating loss in 1945 under Section 122(d)(5) of the Internal Revenue Code, which they could carry back to the taxable year 1943 under Section 122(b) thereof, on account of a loss sustained by them in 1945 on foreclosure sale of their dairy cattle herd and equipment used by them in their dairy farm business in 1944 and 1945.

STATUTES INVOLVED

These are set out in the Appendix, *infra.*

STATEMENT

The facts as found by the Tax Court are based largely upon a stipulation (R. 23-25) and may be summarized as follows:

The taxpayers, Ben A. Puente and Marion Puente, husband and wife, in the years 1944 and 1945 were engaged in the dairy farming business at Lodi, California, on a rented farm. The taxpayers' dairy and

cattle herd, as well as their farm equipment, was bought on credit, their debt for the purchase price having been secured by a chattel mortgage thereon. In 1945 both the herd and the equipment were sold at foreclosure sale at the insistence of the mortgage holder, resulting in a loss of $4,575.30. (R. 19.)

The full amount of the loss was included by the taxpayers in their computation of a net operating loss for 1945. They filed a claim for refund of all income and victory taxes assessed and paid on their income and victory tax return for the calendar year 1943, on the basis that the net operating loss was computed in accordance with Section 122 of the Internal Revenue Code and was allowable as a net operating loss carryback for the year 1943. The Commissioner denied the claim. (R. 19.) The deficiency determined by him resulted in part from such disallowance. (R. 13.)

SUMMARY OF ARGUMENT

Four Courts of Appeals, in six cases, have decided the question here presented against the taxpayers' contention. The decisions in these cases were considered and are correct. They should, therefore, be followed here. A consideration of the language of Section 122(d) (5) of the Internal Revenue Code discloses an intention on the part of Congress to include in net operating losses for carry-back and carry-over purposes only such losses as were sustained by a taxpayer in the normal and continuous operation of his business, and not those sustained by him in the course of its liquidation. The fact that, under Section 23(e)(1), the taxpayers are allowed an ordinary de-

duction for gross income in the taxable year 1945 on account of the loss here in question does not establish that such loss is a "net operating loss" under Section 122(d)(5), which may be spread over a five-year period, as provided in Section 122(b). The taxpayers' assertion to the contrary not withstanding, the history of the "net loss" provisions of prior Revenue Acts, and the decisions under them, support this view. The provisions of Article 651 of Treasury Regulations 74, promulgated under the net loss provisions of the Revenue Act of 1928, upon which the "net operating loss" provisions of the Code are said to be based, to the effect that "net losses" include losses from the sale of capital assets used in a trade or business, do not support the taxpayers' contention that a loss sustained by them on the sale of their dairy cattle herd and dairy equipment upon the termination and liquidation in 1945 of the dairy business they had theretofore conducted constitutes a net operating loss, which they could carry back to the taxable year 1943, within the meaning of Section 122(d)(5). This Regulation was promulgated to carry into effect the provisions of Section 117(a)(2) of the 1928 Act, relating to the computation of capital net losses, the counterpart of which is Section 122(d)(4) of the Code, not here involved. The taxpayers' assertion that liquidating losses sustained by corporations are treated as net operation losses under that section is incorrect, and their conclusion that similar losses sustained by individuals should likewise be so considered is irrelevant. The construction placed by applicable Treasury Regulations upon Section 23(k)(1) of the Code relating to

business losses, so as to differentiate between the treatment taxwise of business and non-business losses, is also irrelevant here.

ARGUMENT

The Taxpayers did not Sustain a Net Operating Loss in 1945, under Section 122(d)(5) of the Internal Revenue Code, which they could carry back to the Taxable Year 1943, under Section 122(b), on Account of a Loss Sustained by them in 1945 on a Foreclosure Sale of their Dairy Herd and Equipment used by them in the operation of their Dairy Business in 1944 and 1945.

A. Four Courts of Appeals Have to Date Held That Losses Sustained on the Sale of Business Assets Upon the Termination of a Business are not Attributable to Its Operation Within the Meaning of Section 112(d)(5)

Before proceeding with a consideration of the proper construction of the net operating loss provisions of Section 122(d)(5) of the Internal Revenue Code (Appendix, *infra*), upon which the taxpayers rely for their claim that they are entitled to a net operating loss carry-back for the year 1945 to the taxable year 1943, on account of a loss which they sustained in 1945 as a result of the liquidation of their dairy business and the foreclosure sale of their dairy herd and equipment, it should be pointed out that four Courts of Appeals, namely, the Eighth, Second, Fifth and Sixth, in the order named, have rejected the same contention as is made by the taxpayers here, the Eighth and Second Circuits having twice rejected it to date. The Eighth Circuit's decisions were rendered in the cases of *Lazier* v. *United States,* 170 F. 2d 521, and *Sic* v. *Commissioner,* 177 F. 2d 469, certiorari denied, 339 U. S. 913; the Second Circuit's in the cases of *Merrill* v. *Commissioner,* 173 F. 2d 310, and *Baruch* v.

Commissioner, 178 F. 2d 402; the Fifth Circuit's in the case of *Pettit* v. *Commissioner,* 175 F. 2d 195; and the Sixth Circuit's in the case of *Smith* v. *United States,* 180 F. 2d 357. To be sure, the taxpayers assert that all of these cases were erroneously decided because, as they say, all of them rest upon an alleged erroneous decision of the Tax Court in the case of *Sic* v. *Commissioner,* 10 T. C. 1096 (affirmed, as stated, by the Eighth Circuit, as well as upon an alleged equally erroneous ruling of the Income Tax Unit of the Bureau, namely, I. T. 3711, 1945 Cum. Bull. 162.

In any case, the taxpayers' contention (Br. 6), that these decisions are based on a "'follow-the-leader' down the path of least resistance pattern," is entirely unfounded. In this connection, it is to be noted that both decisions of the Eighth Circuit, namely, those rendered in *Lazier* v. *United States* and *Sic* v. *Commissioner, supra,* as also the decision of the Second Circuit in *Merrill* v. *Commissioner, supra,* obviously gave full and independent consideration to the problem. Indeed, the Eighth Circuit in the *Sic* case appears to have reconsidered its former opinion in the *Lazier* case in the light of the claim of the taxpayer there that its former decision in the case of *Washburn* v. *Commissioner,* 51 F. 2d 949 (hereinafter again referred to), decided under the net loss provisions of Section 204(a) and (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, was inconsistent with its holding in the *Lazier* case, concluding that it was not. Moreover, so far as concerns the decision of the Second Circuit in the *Merrill* case, it seems that, while in the *Lazier* case the Eighth Circuit considered the decision of the Tax

Court in the *Merrill* case (*Merrill* v. *Commissioner,* 9 T. C. 291), the Court of Appeals for the Second Circuit does not appear to have decided the problem on the basis of any authority, but solely upon its own evaluation of the applicable principles.

To be sure, the taxpayers say (Br. 6-7) that both the Eighth Circuit in the *Lazier* case and the Fifth Circuit in the *Pettit* case indicated that there may have been some doubt as to the construction of Section 122(d)(5). But such doubt as there was was obviously resolved by both courts in favor of the construction placed thereon by the Commissioner and against that placed thereon by the taxpayers. It was of course the function of these courts to resolve such doubt. See *White* v. *United States,* 305 U. S. 281, 292. As the Supreme Court pointed out in *Webre Steib Co.* v. *Commissioner,* 324 U. S. 164, 169, the difficulties presented in the construction of taxing statutes will not excuse the Court from the duty to apply as best as it may a statute Congress has seen fit to enact.

While this Court is not bound to follow the decision of another Circuit, it is well settled that one Court of Appeals will follow the decision of another unless it believes such decision to be erroneous. See e.g., *Grain Belt Supply Co.* v. *Commissioner,* 109 F. 2d 490, certiorari denied, 310 U. S. 648, where the Eighth Circuit followed a prior decision of the Tenth Circuit, because, as the court said, it would not be justified in refusing to do so unless it was satisfied that the decision was erroneous, which it was not. And, in the case of *United States* v. *Armature Rewinding Co.,* 124 F. 2d 589, 591, the same court followed a prior

decision of this Court for the same reason. The converse of this principle is, of course, also true; that is to say, that a Court of Appeals will not follow the decision of another Court of Appeals if it believes that decision to be erroneous. See e.g., *Reo Motors* v. *Commissioner,* 170 F. 2d 1001, where the Sixth Circuit refused to follow a prior decision of the Fifth Circuit, the conflict which had thus arisen having been settled by the Supreme Court in *Reo Motors* v. *Commissioner,* 338 U. S. 442. It is thus apparent that Courts of Appeals consider it their duty to determine for themselves whether the decisions of other Courts of Appeals are correct before they undertake to follow them. It cannot therefore, in any event, be properly charged that the Courts of Appeals for the Second, Fifth and Sixth Circuits, in the *Baruch, Pettit* and *Smith* cases, *supra,* blindly followed the decision of the Eighth Circuit in the *Lazier* case. We turn to a discussion of the proper construction of Section 122(d)(5) of the Code.

B. A Reference to the Language of Section 122(d)(5) Suffices to Demonstrate the Correctness of the Commissioner's Construction Thereof Which the Four Courts of Appeals Have Approved

Section 23(s) of the Internal Revenue Code (Appendix, *infra*) provides for the allowance of a net operating loss deduction for any taxable year beginning after December 31, 1939, computed under Section 122. Section 122(a) (Appendix, *infra*) defines the term "net operating loss" to mean the excess of deductions allowed by the income tax chapter of the Code over the gross income, "with the exceptions, additions, and limitations provided in subsection (d)." Subsection (d) sets such exceptions, additions, and

limitations out in five paragraphs numbered from (1) to (5) inclusive. It is agreed, however, that the only paragraph here in question is paragraph (5), which reads as follows:

> (5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

It follows that, if the taxpayers' loss here in question is not attributable to the operation of the business which they carried on in 1944 and 1945, they sustained no net operating loss in 1945 within the meaning of Section 122(d)(5), which they could carry back to the taxable year 1943 under Section 122(b). (Appendix, *infra*).

The Commissioner determined that the loss which the taxpayers sustained in 1945 as a result of the foreclosure sale of their dairy herd and equipment was not a loss which occurred in the operation of their dairy business in that year and was therefore not attributable to such operation within the meaning of Section 122(d)(5), but was a loss resulting from the liquidation of that business after it had been terminated, i.e., after its operation had ended.

The only business which the taxpayers carried on in 1944 and 1945 was the dairy business. They were not engaged in the business of buying and selling dairy cattle and dairy equipment. It follows, therefore, that reference to the language of the statute should suffice to demonstrate the correctness of the Commissioner's interpretation of Section 122(d)(5), which, as stated, four Courts of Appeals have already approved, for the statute is concerned only with net *operating* losses, i.e., here, losses sustained in the *operation* of the taxpayers' dairy business, and not with liquidating losses sustained by them in the course of winding up that business after its operations had been discontinued.

The error in the taxpayers' contrary contention is largely induced by the fact that they have disregarded the emphasis to be placed upon the word "operation" in the phrase "attributable to the operation of a trade or business," used in Section 122(d)(5). See *Hartley* v. *Commissioner,* 72 F. 2d 352, 357 (C. A. 8th), affirmed, 295 U. S. 216, which deals *inter alia* with similar language contained in Section 204 of the Revenue Act of 1924, c. 234, 43 Stat. 253, embodying the "net loss" provisions of that Act. Moreover, as the Eighth Circuit said in the *Lazier* case, *supra,* p. 526, Section 122(d)(5) of the Code may, and therefore must be, considered as referring to losses attributable to the normal operation of the business which the taxpayers carried on, and not to losses attributable to a partial or total liquidation of the physical properties used in the conduct of the business. The taxpayers, however (Br. 14-16), have placed the emphasis upon the word "attributable" in that phrase, and in so doing

have assumed, without more, that the liquidation of their dairy business upon its termination, and the forced sale of their dairy herd and equipment in the course of such liquidation, was still an activity carried on by them in the *operation* of their business, and was for that reason "attributable" thereto, within the meaning of Section 122(d)(5). Thus they have assumed the very point in issue here, namely, whether the loss resulting from the sale of the dairy herd and equipment, which they had used in the operation of the dairy business that was discontinued and liquidated, was "attributable" to such operation, within the meaning of that section.

In this connection, the taxpayers have also assumed (Br. 26-27), erroneously we submit, that, because the loss was allowable as an ordinary deduction in computing net income under Section 23(e)(1), as having been "incurred in trade or business," i.e., incurred in their dairy business, within the meaning of that section, it is likewise allowable as a net operating loss under Section 122(d)(5) as one "attributable to the operation" of that business. The fallacy of this contention lies in the fact that it ignores the fundamental difference in the language and purpose of the two sections. The provisions of Section 23(e)(1) are broad, but the deductions therein provided are confined to the taxable year; that is, this section provides for deductions "incurred in trade or business," in the taxable year. Its provisions must, therefore, be sharply contrasted with the much narrower provisions of Section 122(d)(5), which limit the deductions allowed thereby to losses attributable to the "operation" of a trade or business,

i.e., as stated, to "operating losses," which, by contrast, are to be spread over a five-year period, including the taxable year and the two years immediately preceding and following it.

Indeed, to hold that such "net operating losses" are not confined to those which are sustained in the "operation," i.e., the ordinary, normal, continuing activities of the business, would thwart the Congressional purpose which was to permit the spread over a five-year period only of net operating losses of a taxpayer whose business fluctuated from year to year over such period. Thus, under the statutory scheme of spreading such losses over such period, each succeeding taxable year becomes the center of a new net operating loss deduction cycle, and, in order to insure that only net loss from the operation of taxpayer's business in a given year would thus be spread over the indicated five-year period, Section 122(d)(3) (Appendix, *infra*), provides that, in computing the net operating loss for such year, no net operating loss deduction should be allowed.

In short, as indicated, the losses which Congress here envisioned are those which normally might be expected to occur in a given year in the course of the normal operation of the business during that year. We submit that, in the light of such purpose it seems clear that a liquidating loss incurred in the course of winding up the business is not the kind of a loss which Congress had in mind in describing it as one which was "attributable to the operation of a trade or business regularly carried on by the taxpayer."

C. The History of, and the Decisions Dealing With the "Net Loss" Provisions of Prior Revenue Acts Supports the Commissioner's Construction of Section 122(d)(5)

Contrary to the taxpayer's contention (Br. 10-14), the Commissioner's rejection of their claim for refund is also supported by the history of, and the decisions dealing with, the "net loss" provisions of prior Revenue Acts, in which, as the taxpayers correctly say (Br. 17), the net operating loss provisions of the Code had their origin.

The first net loss provision was enacted as Section 204(a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057. This section provided for carry-back of (1) a net loss incurred in the "operation of any business," or (2) losses on the sale in 1919 of war facilities. Apparently the only decision rendered under the provisions of this section is that of the Court of Claims in the case of *Auburn & Alton Coal Co.* v. *United States,* 61 C. Cls. 438.

This case involved a loss from the sale of all of the taxpayer's capital assets consisting of coal mines, mining rights, equipment and other property, none of which was acquired for the production of articles contributing to the prosecution of the war. It was therefore necessary for the taxpayer to bring itself within the provisions of paragraph (1) of this section, which, as stated, provided that, as used therein, the term "net loss" meant only net losses resulting from "(1) the operation of any business regularly carried on by the taxpayer." The court said that, even assuming a "net loss" could be held to cover the sale of a plant, buildings, machinery or equipment or other facilities, it could only, in view of clause (2), reasonably be held to

include the sale of property acquired for the production of articles for the prosecution of the war, that being sufficient in the court's view to prevent the taxpayer's recovery. However, the court went on to say (p. 444):

> If anything further were needed to sustain this conclusion, it is found in the language of (1) of paragraph (a), which is confined to net losses resulting from the "operation of any business regularly carried on." It would at least be somewhat straining the regularly accepted meaning of this language to say that a loss resulting from the sale of all of its plant, buildings, machinery, equipment, or other facilities, which meant a suspension of business, was a loss sustained in the regular conduct of the business. It was a part in fact of an operation end-business, at least temporarily, and certainly as to this plant, etc. This, however, is strengthened by the provision of (2) of paragraph (a), which alternatively provides for a deduction growing out of the sale of a plant, etc., acquired for the production of articles for the prosecution of the war.

The court then pointed out that the changes made by Section 204 of the Revenue Act of 1921, c. 136, 42 Stat. 227, were not controlling of the construction of the 1918 Act. The point is that by Section 204(a) of the 1921 Act the definition of a net loss resulting from the "operation of any business regularly carried on by the taxpayer" was expanded so as expressly to include "losses sustained from the sale or other disposition of

real estate, machinery, and other capital assets, used in the conduct of such trade or business."

Several cases were decided arising under this Act, the most important of these being the case of *Washburn* v. *Commissioner,* already referred to. In that case the Eighth Circuit held that the taxpayer was engaged in the business of organizing and managing corporations, and that a loss sustained by him on the sale of the stock of one of them was a net loss within the provisions of Section 204(a), which, as stated, required the inclusion, for net loss purposes, in losses sustained in the operation of any trade or business regularly carried on by the taxpayer of "losses sustained from the sale or other disposition of real estate, machinery, and other capital assets."

It should be stated here that in *Sic* v. *Commissioner, supra* (pp. 805-806), the Eighth Circuit itself pointed out that the *Washburn* case had no application in the construction of Section 122(d)(5) of the Code, because of the difference in the provisions of Section 204(a) of the 1921 Act and those of Section 122(d)(5). Consequently the court said that its decision in the *Washburn* case did not justify overruling its decision in *Lazier* v. *United States, supra.* For further comment on the *Washburn* case, see this Court's decision in *McGinn* v. *Commissioner,* 76 F. 2d 680, 681; the Second Circuit's decision in *Dalton* v. *Bowers,* 56 F. 2d 16, 18, affirmed, 287 U. S. 404, which involved the provisions of Section 206(a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, presently explained, and *Higgins* v. *Commissioner,* 312 U. S. 212, 216-217.

Another case which arose under Section 204(a) of the 1921 Act that should be mentioned here is the Second Circuit's decision in *Schuette* v. *Anderson,* 55 F. 2d 902. The court in that case, however, denied net loss status to the loss sustained by the taxpayer because, in the court's view, the taxpayer was not regularly carrying on a business, so that the loss was not an incident of a business, but rather whatever activities she was carrying on were incident to the loss, and that the law did not contemplate this. In this behalf the court said (p. 903):

> It [the law] spoke of a business operated on its own account, not of efforts ancillary to the final disposal of a bad investment. * * *

And this brings us to the third and last case decided under the 1921 Act, which needs discussion, namely, *Burnet* v. *Marston,* 57 F. 2d 611 (C.A. D.C.), the only one decided thereunder that is cited by the taxpayers (Br. 11-12), but was distinguished by the Second Circuit in *Merrill* v. *Commissioner, supra,* and does not in the least support their contention.

Indeed, this case did not even involve the sale of capital assets. The losses there in question were sustained by a partnership in the operation of its business in the year 1920, in which it was dissolved and in which the partners liquidated its liabilities totaling about $3,750,000. The taxpayer's share of these losses was $725,473.99, and there was no question that they had resulted from the operation of the partnership's business in 1920. The taxpayer, however, did not pay his share of such losses until 1922. It was also con-

ceded that the taxpayer was entitled to deduct such losses from his gross income in 1922. This left him with a net business loss of $92,102.52 in that year, and the sole question was whether he could carry that loss over to 1923. The Commissioner had held that he could not, but the Court of Appeals held that he could. The court said that the mere fact that the taxpayer had paid his share of the loss in 1922 instead of 1920 did not deprive him of the benefit of Section 204.

Turning, then, to Section 206(a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, we find that inclusion of "losses sustained from the sale or other disposition of real estate, machinery and other capital assets" in the "operation of any trade or business regularly carried on by the taxpayer," was deleted. That section, instead, provided that the term "net loss" meant the excess of deductions allowed by Sections 214 (Applicable to individuals) and 234 (applicable to corporations) over gross income, with the following exceptions and limitations:

> (1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;
>
> (2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains;
>
> * * *

The provisions of Section 206(a) of the 1924 Act have been reenacted in substantially the same form in Section 206(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Sections 117(a) of the Revenue Acts of 1928, c. 852, 45 Stat. 791, and 1932, c. 209, 47 Stat. 169. However, as the taxpayers point out (Br. 11), the provisions of Section 117 of the Revenue Act of 1932 were in effect only a short time, for they were repealed by Section 218 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, and were thereafter replaced by the net operating loss provisions, which were added to the Code as Section 122 by Section 211 of the Revenue Act of 1939, c. 247, 53 Stat. 862.

The leading case under the 1924 Act, and hence controlling, so far as applicable, of the construction of the net loss provisions of all subsequent Revenue Acts, is, of course, *Dalton* v. *Bowers,* 287 U. S. 404, already referred to. That case, however, dealt primarily with the question whether a stockholder's activities in connection with the business of a corporation constituted a business conducted by him.

The Court held that it did not, and for this reason affirmed the Second Circuit's decision denying the taxpayer the benefit of Section 206(a). The taxpayer had sustained a loss in the amount paid by him for stock in a corporation which was liquidated and which the taxpayer had originally established to manufacture and market articles invented by him. The Supreme Court said it approved the statement of the court below to the effect that, by the statute allowing the deduction and carrying over the loss for two years, Congress intended to give relief to persons

engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years; that it was not intended to apply to occasional or isolated losses. And that, of course, applies with the same force here, for the liquidating loss here in question was no less an occasional or isolated one than the loss in the *Dalton* case. It was a loss the like of which could never have occurred again in connection with the taxpayers' business, since it occurred in the course of the liquidation of that business.

Of course, *Dalton* v. *Bowers,* has consistently been followed since. See, e.g., *McGinn* v. *Commissioner, supra; Gruver* v. *Helvering,* 70 F. 2d 292 (C.A. D.C.); *Holmes* v. *Commissioner,* 99 F. 2d 822 (C. A. 2d); *Stephenson* v. *Commissioner,* 101 F. 2d 33 (C. A. 6th), certiorari denied, 307 U. S. 467; *United States* v. *Wooten,* 132 F. 2d 400 (C. A. 5th).

D. The Provisions of the Treasury Regulations Promulgated Under the 1928 Act do not Support the Taxpayers' Contentions

But the taxpayers say (Br. 16) that, under Article 651 of Treasury Regulations 74, promulgated under Section 117(a) of the 1928 Act, "net losses" include losses from the sale or other disposition of real estate, machinery and other capital assets used in the conduct of such trade or business. The contention is that the same rule should have been applied here by the Commissioner, since the net operating loss provisions of the Code derive from the net operating loss provisions of the 1928 Act.

What the taxpayers have failed to state is that, immediately following the statement in Article 651 of the Regulations above referred to, the reader is directed to see Section 101 of the 1928 Act relating to net capital losses, and to Article 503 of the same Regulations promulgated with reference to the computation of such losses. The occasion for this reference, however, is the fact that Section 117(a)(2) of the 1928 Act provides that, in computing the net loss of the taxpayer under that section, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of capital gains. It is to be noted that a similar provision is contained in Section 122(d)(4) of the Code. But, as we said at the outset of our argument, the only paragraph of Section 122(d) which is here in question is paragraph (5). Thus, since paragraph (4) is not inolved here, it is obvious that the Regulations promulgated to carry its 1928 prototype into effect can have no possible application.

E. The Taxpayer's Contention is Pointless That by Applicable Tax Court Decisions Corporate Losses are Accorded Different Treatment From Individual Losses Under Section 122(d)

The taxpayers further contend (Br. 24-26) that since, as they assert, a corporation is entitled to a net operating loss under Section 122(d)(5) on account of a liquidating loss, no reason is perceived why an individual should not be entitled thereto. In support, the taxpayers cite *Northway Securities Co.* v. *Commissioner,* 23 B.T.A. 532, and *Acampo Winery & Distilleries, Inc.* v. *Commissioner,* 7 T. C. 629. But neither of these decisions supports the taxpayers' contention.

The *Northway Securities Co.* case was decided under

Section 204(a) of the 1921 Act, which, as stated, specifically provided that a net loss resulting from the operation of a business should include losses sustained from the sale of capital assets used in its operation.

As regards the case of *Acampo Winery & Distilleries, Inc.,* it appears from the Tax Court's opinion (p. 640) that the parties had stipulated facts from which a net operating loss deduction in 1943, on account of a net operating loss sustained by the taxpayer in 1944 and 1945 could be computed. As pointed out by the Tax Court, the Commissioner's sole contention was that no deduction could be allowed because the taxpayer was "substantially liquidated and marking time" during 1944 and 1945, and "was no more the *taxpayer* it was in previous years, in substance and in fact, than if it had legally changed its existence." The Tax Court rejected this contention. It does not appear from the Tax Court's report what the nature of the loss was which the taxpayer had sustained in 1944 and 1945, and there is nothing whatever to show that it was a liquidating, as distinguished from an operating, loss.

F. The Construction Placed by Applicable Treasury Regulations Upon Section 23(k)(1) of the Code is Irrevelant Here

Finally, the taxpayer contends that the position which the Commissioner has taken here is inconsistent with the construction he has placed on Section 23(k)(1) relating to business losses in Example (6) of Section 29.23(k)-6 of Treasury Regulations 111, promulgated under the Internal Revenue Code, which provides that a loss in liquidating a trade or business is to be regarded as a proximate incident to its conduct, so as to remove it from the provisions of Section

23(k)(4), which require a worthless non-business debt to be treated the same as a loss of a capital asset. If we assume, as we must for the purposes in hand, that this regulation is valid, it is obvious that Congress did not intend to have the capital gain treatment of non-business losses under Section 23(k)(4) apply to losses incurred in liquidating a trade or business under Section 23(k)(1). But it does not follow that because thereof Congress intended to allow a net operating loss for carry-back and carry-over purposes on account of a liquidating loss, under Section 122(d)(5).

It follows that the Tax Court's decision, denying the taxpayers a deduction in the taxable year of a net operating loss carry-back of the liquidating loss it sustained in 1945, is correct.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be sustained.

Respectfully submitted,

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Special Assistants to the Attorney General.

MAY, 1952.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [as added by-Sec. 211, Revenue Act of 1939, c. 247, 53 Stat. 862]. *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 122 [as added by Sec. 211, Revenue Act of 1939, *supra,* and amended by Secs. 105 and 153 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first

preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941, shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6)

and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

(c) *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carrybacks to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d)(1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e)).

(d) *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114 (b) (2), (3), or (4);

(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed

by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23(b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

(3) No net operating loss deduction shall be allowed;

(4) [as amended by Sec. 150(e), Revenue Act of 1942, c. 619, 56 Stat. 798]. Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains.

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

* * * * *

(26 U.S.C. 1946 ed., Sec. 122.)

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No. 13,239

IN THE

United States Court of Appeals

For the Ninth Circuit

BEN A. PUENTE and MARION PUENTE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review a Decision of The Tax Court of the United States.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

PRELIMINARY STATEMENT.

As disclosed in their respective opening briefs the parties to this proceeding are substantially in accord as to the jurisdiction of this Court, the facts involved, and the question presented for the Court's determination. Cf. pages 1 to 4 of the petitioners' opening brief and pages 1 to 3 of the respondent's brief.

ARGUMENT.

I. THE RESPONDENT'S ARGUMENTS ON PRECEDENTS IN COURTS OF APPEALS ARE MISLEADING.

In the petitioners' opening brief the force of four opinions in United States Courts of Appeals for other circuits in favor of the respondent has been freely admitted, and this Court has been asked to go contrary to those opinions on the basis of the petitioners' arguments throughout their opening brief that they were wrongly decided. In the respondent's argument under his Proposition A, pp. 5-8 of his brief, he has imported two additions to the list of adverse decisions. One of these, *Smith v. United States,* 180 F. (2d) 357 (C.A. 6, 1950), affirming *per curiam* 85 F. Supp. 838 (D. C. W. D. Tenn., 1948), is properly mentioned in connection with the question here involved. Examination of the facts found by the District Court indicates, however, that factually the case is a borderline one, the taxpayer's only business having been the operation and management through agents of an apartment house for the production of rent income. The other case so imported, *Merrill v. Commissioner,* 173 F. (2d) 310 (C.A. 2, 1949), does not involve in any way the sale of property or equipment used in business. The statement, p. 6 of the respondent's brief that the petitioners "assert that *all* of these cases were erroneously decided" is patently inapplicable to any position of the petitioners with respect to the *Merrill* case.

Contrary to the implication in the respondent's statement, the petitioners agree that the *Merrill* case was expertly decided on the basis of careful analysis

of the language and intent of the terms of section 122, Internal Revenue Code. It is, indeed, hard to understand how the same Court, having a related but different question before it in the case of *Baruch v. Commissioner,* 178 F. (2d) 402, not quite ten months later, disposed of it so summarily on consideration of a brief for the petitioner *Baruch* which brief has been the model of the arguments for the petitioners in the instant case. There is certainly nothing in the *Merrill* case decision which would have been inconsistent with a decision in Mr. Baruch's favor. For the respondent to emphasize the merits of the *Merrill* decision as being a well considered one, *which it was,* on the question here involved, *which it was not,* is plainly misleading as to any bearing that case may have on the question here involved.

II. THE RESPONDENT'S EXEGESIS OF SECTION 122(d)(5) IS FAULTY.

In his argument under Proposition B on the construction of the phrase "not attributable to the operation of a trade or business regularly carried on", pp. 8 to 12 of his brief, the respondent insists that the emphasis should be on the word *"operation"* and that the word *"attributable"* should be treated as a mere connective. Such argument is contrary to the rule of construction that all the words of the statute should be given their usual and ordinary meaning to effectuate the indicated purpose of the legislature. He would have this Court give paramount significance to the word *"operation"* which is only one word in a

sub-phrase, "operation of a trade or business regularly carried on", to the detriment of the word "attributable". That plea is merely a restatement of the thesis of the respondent's ruling in I.T. 3711, C.B. 1945, p. 162, a critical analysis of which is printed on pp. 16 to 22 of the petitioners' opening brief. The respondent does not, indeed, defend in his brief either the argument or the alleged "authorities" of I.T. 3711 but he does attempt in his argument to muddle the interpretation of the comparatively simple phrase under discussion by a reference to the opinion in *Hartley v. Commissioner,* 72 F. (2d) 352 (C.C.A. 8, 1934) which merely holds that a deduction for Federal Estate taxes paid (deductible for income tax purposes under Section 214(a)(4) of the Revenue Act of 1924) were not includible in a net operating loss.

For the rest of his argument under the subject Proposition B the respondent merely begs the question by attributing to the petitioners arguments not actually made by them, and then demolishing such assumed arguments to his own satisfaction. The petitioners, for instance, never have contended, with respect to the losses on their sales of cattle and equipment, that such sales were anything but liquidating sales which were the final transactions of their dairy business, fully *attributable,* however, by way of cause and effect, to the beginning, middle, and end of the operation of such business.

The petitioners' argument under their Proposition IV, which the respondent appropriately refers to in his proposition on the construction of the crucial

phase of Section 122(d)(5), from the distinctions between the three classes of losses covered by Section 23(e), far from being fallacious in "that it ignores the fundamental difference in the language and purpose of the two sections", is apposite to the problem of construction. This is so because of the definition of "net operating loss" in Section 122(a), copied at p. 23 in the appendix to the respondent's brief. By that definition any deduction allowable under Section 23(e)(1) as "incurred in trade or business" is a part of the "net operating loss" unless ruled out by the excepting terms of Section 122(d)(5). That brings us right back to the point at issue here, whether the term "attributable to the operation of a trade or business" is inclusive or exclusive of a deduction for a loss "incurred in trade or business".

The respondent does not deny that the losses here in question were subject to the provisions of Section 117(j)(1) and (2), Internal Revenue Code, and of Section 23(e)(1), *idem,* insofar as the petitioners' taxable income for 1945 is concerned.

III. THE RESPONDENT HAS FAILED TO OVERCOME THE PETITIONERS' ARGUMENTS FROM THE HISTORY OF NET OPERATING LOSS PROVISIONS OF THE INCOME TAX LAW.

Under Propositions C and D of the respondent's brief he has attempted to answer the petitioners' argument under their Proposition II that "the history of the net operating loss provisions of the Income Tax Law indicates no intention to exclude from 'the net

operating loss' losses incurred in the disposal of assets used in the trade or business".

His argument under Proposition C is more eloquent in what it omits than in what it says. Discussion of the case of *Auburn and Alton Coal Co. v. United States,* 61 Ct. Cls. 438, a 1926 decision under Section 204(a), Revenue Act of 1918, is pointless for the reason that that section does not define a net operating loss by a specific reference, as in the Revenue Acts of 1924, 1926 and 1928 and in Section 122(a) of the Internal Revenue Code, to the excess of deductions allowed by the Income Tax law over gross income, with certain exceptions and limitations. Cf. the paraphrases of the provisions of Section 206(a), Revenue Act of 1924, at p. 17 of the respondent's brief and at p. 10 of the petitioners' brief.

The respondent's discussion of cases under Section 204(a) of the Revenue Act of 1921 for the inclusion in net operating losses of "losses sustained from the sale or other disposition of real estate, machinery, and other capital assets", the respondent means to give the impression that such losses were thereafter excluded, such impression would be entirely false. The definition of "net loss" or "net operating loss" in the Revenue Act of 1924 and in subsequent statutes as the excess of allowable deductions over gross income automatically took care of deductions for such losses as had been specifically included in the definition in Section 204(a) of the 1921 Act. The treatment of such losses varied however with the mutations in the definition of "capital assets" in the income tax law.

CORRECTION OF SECOND PARAGRAPH PAGE 6

Matter omitted in printing is included in brackets below.

The respondents discussion of cases under Section 204(a) of the Revenue Act of 1921 [likewise does not develop any matter contrary to the petitioners' conclusions. If, in mentioning on p. 15 and again on p. 17, the provisions of Section 204(a) of the Revenue Act of 1921,] for the inclusion in net operating losses of "losses sustained from the sale or other disposition of real estate machinery or other capital assets", the respondent seems to give the impression that such losses were thereafter excluded, such impression would be entirely false.

In his references to *Dalton v. Bowers,* 287 U.S. 404 (1932), 53 S.Ct. 205, 77 L.Ed. 389, and to the same case in the Circuit Court of Appeals, 56 F. (2d) 16, the respondent, like Judge Leech in his opinions in *Joseph Sic,* 10 T.C. 1096 (1948), (Cf. petitioners' brief p. 23) overlooks the only important point in these opinions relating to the instant problem, *viz.* the approval, specific at 56 F. (2d) 18, and implied in the Supreme Court's opinion, of the provisions of Art. 1621, Income Tax Regulations 65, which are substantially like those of Art. 651, Regulations 74, quoted on p. 11 of the petitioners' opening brief. The specific issue regarding a loss on corporation stock settled in the *Dalton* case is so little like the issue as to the losses sustained by the petitioners, that the Court's decision on that issue is of no assistance here. The approval of Art. 1621, Regulations 65, is, however, significant.

In his argument under his Proposition D the respondent not only fails to acknowledge the force of the approval of his regulations under the pre-Depression Revenue Acts in the *Dalton* case, supra, but actually avoids the issue by calling attention to the failure of the petitioners to repeat on page 16 of their opening brief matter from Art. 651, Regulations 74, which had been printed in full on page 11 of the same brief. The losses on sales of dairy stock and farm equipment here involved are *ordinary,* not capital, losses under the provisions of Section 117(j), Internal Revenue Code. The plain implication of the quoted paragraph of Art. 651 is that they would have been

ordinary losses under the provisions of the Revenue Act of 1928. However, the provisions for exclusion of net capital losses, whatever their definition, from net operating losses are similar under the 1928 Act and the present statute. The details of such provisions as they existed in the 1928 Act or in subsequent statutes have no bearing whatever on the issue in this case.

IV. THE RESPONDENT HAS FAILED TO OVERCOME THE PETITIONERS' ARGUMENTS ON PARITY OF INDIVIDUALS AND CORPORATIONS WITH RESPECT TO LOSSES ON DISPOSAL OF PROPERTY USED IN TRADE OR BUSINESS.

In the respondent's arguments under his Proposition E, pp. 20 and 21 of his brief, against the grounds for the petitioners' Proposition IV, pp. 24-28 of their brief, he does not dispute the obvious effect of the provisions of Section 23(f), Internal Revenue Code, to treat all losses of Corporations as losses incurred in trade or business. Because, under the provisions of Section 117(j), which is applicable alike to corporations and individuals, losses on sales or other disposition of property, including real estate, used in trade or business are ordinary losses, there are, by virtue of the inclusive quality of Section 23(f), no substantial problems involving the effect of such losses on the computation of "net operating losses", and only in frequent cases in the Courts concerning corporations' net operating loss deductions. The only two cases discoverable which touched on the point were cited in the petitioners' brief, p. 24. The distinctions pointed out in the respondent's brief, pp. 20,

21, respecting those cases, do not in any manner weaken the fact that the income tax law allows, by the force of Sections 23(f), 117(j), and 122(a) the inclusion in a corporation's "net operating loss" losses on the disposal of assets used in its trade or business. Since, with regard to individuals Section 23(e)(1) of the same statute is the equivalent of Section 23(f) affecting corporations, Section 117(j) losses, which are allowable under Section 23(f) or Section 23(e)(1), as the case may be, are includible in the definition of "net operating loss" by Section 122(a) without distinction of a taxpayer as individual or corporation. What the respondent says about these similarities, which were pointed out in the petitioners' brief under their Proposition IV, is *nil.* What, indeed, could he say, other than to admit the effect of the plain provisions of the statute?

CONCLUSION.

For the reasons set forth in the petitioners' opening brief, which, as demonstrated above, the respondent has in the arguments in his brief failed to overcome, the petitioners pray that the decision of The Tax Court subject of this proceeding be reversed.

Dated, Stockton, California,
May 28, 1952.

Respectfully submitted,
LAFAYETTE J. SMALLPAGE,
Attorney for Petitioners.

No. 13241.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH B. DROWN, an individual trading as DROWN LABORATORIES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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IN THE

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FOR THE NINTH CIRCUIT

RUTH B. DROWN, an individual trading as DROWN LABORATORIES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
Statement of Jurisdiction.

Pursuant to 21 U. S. C. 331(a), 21 U. S. C. 333(a), and 18 U. S. C. 3231, the District Court had jurisdiction to try the defendant-appellant.

Under 28 U. S. C. 1291, this Court has authority to review the judgment of the District Court.

II.
Statement of Facts.

A. Summation of Case.

The one-count Information filed in this case charges the defendant Ruth B. Drown with violating the Federal Food, Drug, and Cosmetic Act by causing a misbranded device called "Drown Radio Therapeutic Instrument" to be

delivered for introduction into interstate commerce. [R., Vol. 7, p. 2.] The Information charges that the device was misbranded by reason of claims in its labeling that were allegedly false and misleading both with respect to *this* device and with respect to *another* device which is also marketed by the defendant.

At the outset of this proceeding in the District Court, defendant filed a Motion to Dismiss asserting she had not caused the delivery of said device for introduction into interstate commerce, as charged. [R., Vol. 7, p. 11.] This Motion was submitted upon a written Stipulation as to Facts [R., Vol. 7, p. 46], and was denied by the lower court in a memorandum opinion. [R., Vol. 7, p. 13.]

After a two-week jury trial, the defendant was found guilty as charged [R., Vol. 7, p. 23], and was sentenced on October 22, 1951, to pay a fine of $1000. [R., Vol. 7, p. 36.] On October 25, 1951, defendant filed a Notice of Appeal. [R., Vol. 7, p. 37.]

B. Nature of Defendant's Devices.

The defendant, Dr. Drown, is a chiropractor who does business in Hollywood, California, under the fictitious name of Drown Laboratories. [R., Vol. 7, p. 46.] She manufactures, sells and uses in her practice, a number of devices [including the two in question, Exs. 9 and 11] for which she claims remarkable therapeutic and diagnostic properties in her labeling.

For example, the Drown Radio Therapeutic Instrument [Ex. 9] is represented as capable of eliminating a lump in the breast and preventing cancer therefrom; as efficacious in treating kidney and bladder complications, tipped uterus, streptococcus in the ureter and urethra, cirrhosis, carcinoma of the right kidney, fibrous adhesions in the brain, heart

trouble of many years' standing, explosions in right ear when falling asleep, constipation, headaches, abscesses, loss of speech and memory, worry, fear and nervousness, affections of the kidney, gall bladder, colon, liver, ovary, small intestine, bile, uterus and rectum; and for the efficacious treatment of many other conditions specified in the Information [R., Vol. 7, pp. 3-5], surpassing any other known method of therapy. [Ex. 2 (see case histories); Ex. 5.]

Another Drown Radio Therapeutic Instrument [Ex. 11] is cased in a larger box and is represented as having not only all of the *therapeutic* qualities attributed to the smaller box [Ex. 9] but also extraordinary *diagnostic* capacities such as the ability to measure the functions of the body and its various parts, count blood cells, analyze urine, ascertain blood pressure and body temperature, uncover many obscure conditions, etc., simply by "tuning" into the body. [Exs. 2, 10.]

These devices use no commercial electricity; they are represented as employing the patient's own body energy in diagnosis, remedy selection, and treatment. [Ex. 2.] "By body energy we mean that electro-magnetic force which is generated by the combination of the minerals and the fluids in the body, as well as the total life force, which is an invisible light ray just past the white light in the spectrum, as the infra-red is beneath the spectrum." [Ex. 2.]

Defendant's theory of vibration is basic to her espousal of these devices. ". . . under the laws of vibration, each individual has a rate of vibration peculiar to himself. In addition, each organ, gland, etc., in the body has its own rate of vibration. Likewise various diseases all vibrate

to specific rates (slower or coarser than the normal body rates and more akin to earth vibrations)." [Ex. 2.]

In treating a patient, defendant asserts—so far as we are able to comprehend what she says—that the device captures the body energy emanating from the patient and sends that energy back to the diseased area of the patient's body at the vibration rate previously found in diagnosis as being appropriate for the treatment of that particular area. This focuses the body energy on that area and steps up the vibrations there. As a result, the diseased cells "automatically fall away since disease cannot live in the higher rate of vibration." [Ex. 2.]

Both diagnosis and treatment, the defendant claims, may be accomplished either directly or by "remote control." When the patient is physically close to the instrument, two pieces of metal attached to wires plugged into the instrument are placed upon the body, one on the feet and the other on the stomach. A drop of the patient's blood on blotting paper is placed in a slot in the device, and an unopened ampul said to contain one of several chemicals may be placed in a well on the face of the device. [R., Vol. 1, pp. 24-25.]

When the patient is not physically close to the device, the two pieces of metal are clamped together with a drop of the patient's blood on blotting paper between them. The patient can be anywhere, even thousands of miles away, yet allegedly be completely diagnosed and receive treatment. It is wholly immaterial that the patient's sex, symptoms, and medical history are unknown to the operator of the device. [R., Vol. 1, pp. 25-26, 21; Vol. 2, pp. 435-439.]

The Government's witnesses included some of the country's outstanding men of science with specialized training

and experience in the fields of physics, electrical engineering, radiology, physiology and pharmacology, urology, cancer, thoracic surgery, and physical medicine.

Two qualified witnesses had taken the instruments apart, studied their circuits, and testified as to their physical properties. Dr. Moses Greenfield is a physicist who did research for the Navy during the war, represented the Navy at the Bikini atom bomb experiment, did research in physics with North American Aviation since the war, is associated with the School of Medicine at U. C. L. A. in the field of atomic energy, and is a consultant to the Atomic Energy Commission. [R., Vol. 1, pp. 184-186 and 211.] He testified that Exhibit 9 and Exhibit 11 are identical in function. [R., Vol. 1, p. 196.] Essentially, each device consists of a wire with two dissimilar metals as electrodes at either end. When the circuit is completed by placing the electrodes in contact with the human body or with any other conductor of electricity, a minute flow of electrical current is generated between the two metals, and this flow is measured by the microammeter in the device. [R., Vol. 1, pp. 187-190.] This is in effect the way a chemical battery operates. If two dissimilar metals are used in any circuit, there will be a flow of current between them measurable on a microammeter. [R., Vol. 1, pp. 197 and 199.] Defendant's devices are incapable of detecting, measuring, or transmitting electro-magnetic radiation of any kind. [R., Vol. 1, pp. 234-235.]

Mr. Robert J. Stratton is a radio engineer for the Federal Communications Commission with extensive experience in electrical engineering with the Commission and the Columbia Broadcasting System. [R., Vol. 1, pp. 86-87.] He took apart the two devices [Exs. 9 and 11] and made a diagram of each of the circuits which diagrams

are in evidence as Exhibits 12 and 13. His description of the operation of these devices is substantially the same as that of Dr. Greenfield. [R., Vol. 1, pp. 90-94.] These devices are incapable of measuring or transmitting radio waves. [R., Vol. 2, pp. 243-244.] There is nothing in the boxes of either Exhibit 9 or Exhibit 11 except the circuit. [R., Vol. 2, pp. 245-246, 248.]

Mr. Stratton had occasion to investigate Dr. Drown's activities in 1947 on behalf of the Federal Communications Commission to ascertain whether radio waves were emanating from any of her devices, and he determined that none of her equipment could possibly radiate, including devices of the same construction as Exhibits 9 and 11. [R., Vol. 2, pp. 249-253, 257-258.] Dr. Drown at that time advised Mr. Stratton that she was giving a long distance treatment to a patient in another city, dissolving the patient's gallstones. [R., Vol. 2, pp. 255-256.]

Before summarizing the medical testimony in the case, we shall describe the facts which comprise the interstate transaction.

C. The Interstate Transaction.

Dr. Drown does business in Hollywood, California, under the fictitious name of Drown Laboratories. Mr. and Mrs. Edgar C. Rice resides at 13005 Greenwood Avenue, Blue Island, Illinois, a suburb of Chicago. On April 23, 1948, Dr. Drown examined Mrs. Rice at the Stevens Hotel in Chicago with one of the Drown instruments. Mrs. Rice complained of a lump in her breast. Her family doctor had examined her earlier that month, suspected a possible carcinoma, and suggested an immediate biopsy. [R., Vol. 1, pp. 40 and 50-51.] Dr. Drown concluded the lump was not a cancer but was caused by a

fungus growth that had spread through her digestive system into the liver. She recommended treatments with the Drown Radio Therapeutic Instrument by a Dr. John, who practiced and maintained his office in Chicago, Illinois. [R., Vol. 1, p. 37 and Vol. 7, p. 47.] Such treatments were given to Mrs. Rice directly and through "radio control" by Dr. John. In September of 1948, Dr. Drown again examined Mrs. Rice in Chicago and recommended continuation of the treatments. [R., Vol. 7, pp. 46-47.] Mrs. Rice received such treatments from Dr. John until she and her husband purchased the Drown instrument in question in October of 1948. [R., Vol. 1, p. 31.]

The firm with which Mr. Rice is employed has its offices in Los Angeles and in Chicago. His business takes him to Los Angeles frequently. On October 28, 1948, Mr. Rice while in Los Angeles personally went to the offices of the Drown Laboratories in Hollywood and there purchased a complete Drown Radio Therapeutic Instrument, Model No. 98 M, Serial No. 10264817, from Miss Zella Koerner, a sales representative of the Drown Laboratories. This instrument is in evidence as Exhibit 9. [See also R., Vol. 7, p. 50.] At the time of the purchase, Dr. Drown gave Mr. Rice a leaflet entitled "Drown Atlas," in evidence as Exhibit 3. This leaflet contained dial settings for the use of Mrs. Rice in treating herself with the Instrument. [R., Vol. 7, pp. 47-48; Vol. 1, p. 24.]

The invoice covering the sale of the Instrument by Drown Laboratories to Mr. Rice is in evidence as Exhibit 1. [See also R., Vol. 7, p. 48.] This invoice declares that the device was sold to Mr. Edgar Rice and sets forth his Blue Island, Illinois, address. The invoice

is marked "Paid" "By Z. K." In fainter writing, there appears the following: "O.K. R.B.D."

At the time of this purchase. Mr. Rice also obtained from the Drown Laboratories a copy of the circular which is in evidence as Exhibit 2. He and Mrs. Rice had obtained another copy of that circular on April 23, 1948, when Dr. Drown first examined Mrs. Rice at the Stevens Hotel in Chicago. [R., Vol. 7, p. 48.] This is the circular which contains most of the therapeutic and diagnostic claims made for the Drown instruments.

Mr. Rice then took the instrument [Ex. 9] and the literature which he obtained from the Drown Laboratories [Exs. 2, 3, and 10] back to Blue Island, Illinois, where his wife discontinued the treatments with Dr. John [R., Vol. 1, p. 31] and used this instrument to treat the lump in her breast, directly and through "radio control" for approximately one year. [R., Vol. 7, pp. 47-48.]

Thereafter, at the request of Mr. Rice, Dr. Drown made several diagnoses of Mrs. Rice by "remote control" —that is, while Dr. Drown was in Hollywood and Mrs. Rice was in Blue Island, Illinois. These diagnoses appear on charts which Dr. Drown mailed to the Rices, and which are in evidence as Exhibits 4 and 8. [R., Vol. 7, pp. 48-50; Vol. 1, p. 21.] Dr. Drown made an additional diagnosis of Mrs. Rice in Chicago on February 7, 1949. [Ex. 7; R., Vol. 7, p. 49.]

On March 9, 1949, Mr. Rice wrote a letter to Dr. Drown asking several questions, and by pre-arrangement with Dr. Drown, he left space after each question for the answer, which Dr. Drown then inserted, returning the letter and answers to him. [Ex. 5; R., Vol. 7, p. 49.] Dr. Drown stated that her long distance diagnosis of March 7, 1949, showed some improvement yet revealed

the presence of a new lump which she demonimated "congested lymphatic"; she declared that "the condition has never been cancerous but any lump can cause it if let go long enough without proper treatment"; she concluded by saying, "Mrs. Rice must realize if she is to get well she must swing her attention on to the work and put every effort forth to get well."

In August of 1949, Mr. Rice made a long distance call to Dr. Drown advising her that Mrs. Rice's condition appeared worse and asking for advice. [R., Vol. 7, p. 49.] Dr. Drown responded by letter dated August 3, 1949, now suggesting that Mrs. Rice have the breast removed [Ex. 6], although she had theretofore maintained there was no malignancy and no need for surgery. [R., Vol. 1, p. 53.]

D. The Medical Testimony.

Six witnesses, each of them an authority in a specialized field of medicine, testified on behalf of the Government regarding the merits of the Drown instruments. They were unanimous that these instruments are utterly worthless in the diagnosis or treatment of any disease.

Dr. Elmer Belt is a prominent surgeon and urologist of Los Angeles. He has been a member of the California State Board of Health for eight years, and was president of the Board for four years. [R., Vol. 1, pp. 105-106.] In his opinion, the Drown instruments [Exs. 9 and 11] are useless for the diagnosis or treatment of any disease condition. [R., Vol. 1, pp. 107-108 and 110-111.] "These things would be laughable if they were not so dangerous." ". . . to pretend to treat carcinoma of an organ after it has been recognized, by any hocus-

pocus method such as this endangers the life of the individual. It is well known that the only curative method for the treatment of cancer is usually a complete eradication of the cancer by surgery. To delay the treatment of cancer is equivalent to writing a sentence of death for the patient." [R., Vol. 1, p. 109.]

Dr. George W. Holmes is a physician and surgeon of Chicago, Illinois, specializing in thoracic surgery, which pertains to the chest, chest wall, lungs and heart. He is chief of the thoracic surgery service at Cook County Hospital in Chicago, which has 3500 beds, and he is also chief of thoracic surgery at the Hines Veterans Hospital, which has 3000 beds. [R., Vol. 2, pp. 265-266.]

Dr. Holmes began treating Mrs. Rice of Blue Island, Illinois, on January 31, 1951 [R., Vol. 2, p. 267], and treated her weekly or twice weekly up to August 25, 1951. [R., Vol. 2, p. 273.] Dr. Holmes' examination of Mrs. Rice revealed the presence of a lump in her breast and "much more." [R., Vol. 2, p. 274.] Upon objection of defense counsel, Dr. Holmes was prevented from testifying as to whether that condition is cancerous [R., Vol. 2, p. 272] or what that condition was in 1948.[1] [R., Vol. 2, p. 271.] He was permitted to state that at the time of the trial Mrs. Rice was physically unable to make the trip from Blue Island to Los Angeles for the purpose of testifying. [R., Vol. 2, p. 277.]

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[1]However, upon cross-examination by defense counsel, Mr. Rice stated that his wife's condition is malignant [R., Vol. 1, p. 59] but that medical doctors now advise against surgery because the shock would be too severe for the patient. [R., Vol. 1, pp. 55 and 62.] Cancer must be treated promptly if the patient is to be done any good, and "that is the reason for the trouble we are in . . . because we didn't have something done as soon as we discovered it. . . ." [R., Vol. 1, pp. 54-55.]

In the opinion of Dr. Holmes, the Drown Radio Therapeutic Instrument [Ex. 9] would be absolutely worthless for the treatment of any kind of disease or any kind of tumor. [R., Vol. 2, p. 361.]

Dr. Fred B. Moore is a physician and surgeon of Los Angeles, specializing in physical medicine. He is Professor of Therapeutics in the School of Medicine at the College of Medical Evangelists and is director of the School of Physiotherapy in the same institution. He is also Director of the Department of Physical Medicine at the White Memorial Hospital. Physical medicine is the use of physical agents such as water, light, electricity, and X-rays in the treatment of disease. [R., Vol. 2, pp. 278-279.]

In the opinion of Dr. Moore, the Drown instruments [Exs. 9 and 11] would have no therapeutic or diagnostic value whatever. [R., Vol. 2, pp. 279-287.]

Dr. Sol Baker is a physician in Los Angeles specializing in the diagnosis and treatment of cancer. He was associate director of the Department of Radiation Therapy at the Cedars of Lebanon Hospital. During the war, he was in the naval service as chief of the Department of Radiation Therapy, U. S. Marine Hospital in Baltimore. During the past 15 years, he has seen about 20,000 malignant tumors and between 80,000 and 100,000 non-malignant tumors. [R., Vol. 2, pp. 370-371.]

In Dr. Baker's opinion, the Drown Radio Therapeutic Instrument [Ex. 9] could not possibly eliminate a lump in the breast of any patient or prevent the development of cancer from such a lump. [R., Vol. 2, pp. 377-378.] Nor can the instrument in evidence as Exhibit 11 tune into the body, measure the function of its various parts,

or detect the presence of disease. [R., Vol. 2, pp. 378-379.]

Dr. James W. J. Carpender is a physician of Chicago, Illinois, specializing in the field of radiology. While with the Navy during the war, he was assistant chief of radiology at the National Naval Medical Center at Bethesda, Maryland. He also served on a hospital ship for almost two years as chief of radiology. He is now director of radiation therapy and associate professor of radiology at the University of Chicago. [R., Vol. 2, pp. 427-429.]

In the opinion of Dr. Carpender, the instrument in evidence as Exhibit 11 has no value whatsoever in the diagnosis of any human disease. [R., Vol. 2, pp. 429-430.] This opinion is based both upon his training and experience in the field of medicine and his personal observation of tests conducted upon a similar instrument at the University of Chicago, on December 31, 1949, by the defendant. [R., Vol. 2, pp. 430 and 435.] Defense counsel withdrew his objection to testimony describing these tests. [R., Vol. 2, pp. 432-433.]

The tests referred to were carried on by the defendant in the presence of representatives of the University. Samples of the blood of ten persons were obtained by the University, dried on small pieces of filter paper each of which was identified only by a number. The University retained a separate record regarding the known physical condition of each of these persons. [R., Vol. 2, pp. 435-436.]

The first blood sample selected was "No. 6." Dr. Drown placed this sample in her machine and operated the machine for about an hour. She concluded that the

patient had a Type IV cancer of the left breast with spread to ovaries, uterus, pancreas, gall bladder, spleen and kidney; that she was devoid of vision in her right eye; that her blood pressure was 107 over 71; that the ovaries were not producing ova; and that the following structures showed reduced function—pancreas, adrenal, pituitary, uterus, right ovary, parathyroid, spleen, heart, liver, gall bladder, kidneys, lungs, stomach, spinal nerves, intestines, ears, right eye. Records of the University showed that the patient had tuberculosis of the upper lobe of the right lung. [R., Vol. 2, pp. 435-436.]

With respect to the second blood sample, "No 10," Dr. Drown concluded the patient had dilated pulmonary veins, diseased heart valves, blood pressure of 127 over 80, normal function of both a uterus and a prostate gland, and low function in the following—pituitary, pulmonic and tricuspid valves, gall bladder, stomach, spleen, parathyroids, pancreas, and kidneys. Records of the University showed that the patient, a male, had a bleeding marginal ulcer secondary to gastro-enterostomy. His heart was normal. Dr. Carpender took the patient's blood pressure on two occasions on the afternoon when Dr. Drown conducted the tests. He testified that the pressure of the right arm on one occasion was 218 over 138 and on the other, 230 over 135. He also testified that the pressure of the left arm was 220 over 140 on one occasion, and 240 over 135 on the other. [R., Vol. 2, pp. 437-438.]

With respect to the third and last blood sample worked on by Dr. Drown, "No. 1," Dr. Drown reported that

the patient had an ischiorectal abscess, serious trouble with the prostate which was probably carcinoma with spread to urethra and the pelvic bones, loss or non-function of the left testicle, blood pressure of 166 over 78. Dr. Drown concluded that the prognosis or prediction of life expectancy in this patient was extremely poor. Records of the University showed that this patient was a healthy young male physician whose blood pressure was not elevated. Dr. Carpender did another physical examination on this person a year and nine months later, just before coming to Los Angeles to testify. He found no evidence of disease. [R., Vol. 2, pp. 438-439.]

The last Government witness, Dr. Homer C. Lawson, is associate professor of pharmacology at the University of Southern California, and assistant dean of the Medical School. He has carried out investigations in the behaviour of biological systems, and the reactions of organs and tissues. [R., Vol. 2, pp. 466-467.]

In the opinion of Dr. Lawson, the instrument in evidence as Exhibit 9 has no value or effect in the treatment of any disease. [R., Vol. 2, pp. 467-471.] The instrument in evidence as Exhibit 11 is incapable of tuning into the human body and its various parts, measuring their function, or detecting the presence of disease; it cannot record impinged nerves, count blood cells, analyze urine either in or out of the body, ascertain blood pressure or body temperature. [R., Vol. 2, pp. 471-474.] Nor is there any electrical magnetism emanating from the human body. [R., Vol. 2, pp. 474-476.]

III.

Statutory Provisions and Regulations Involved.

Federal Food, Drug, and Cosmetic Act:

"21 U. S. C. 352. Misbranded drugs and devices.

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * * * * * *

(f) Unless its labeling bears (1) adequate directions for use . . . *Provided,* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

"21 U. S. C. 331. Prohibited acts.

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"*21 U. S. C. 333. Penalties—Violation of section 331.*

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine . . ."

Regulation of Federal Security Administrator:

"§1.101. *Drugs and devices; labeling, misbranding:*

(a) Among representations in the labeling of a drug or device which render such drug or device misbranded is a false or misleading representation with respect to another drug or device or a food or cosmetic." [21 Code of Federal Regulations (1949 Ed.), p. 12.]

IV.
Questions Involved.

(1) Did the defendant cause the device, which is in evidence as Exhibit 9, to be delivered for introduction into interstate commerce within the meaning of 21 U. S. C. 331(a)?

(2) Is the criminal information fatally defective in any respect?

(3) Did the trial court err in overruling the defendant's motion for an instructed verdict filed at the close of the Government's case?

(4) Did the trial court err in denying the defendant's motions with respect to a new trial and arrest of judgment?

V.
SUMMARY OF ARGUMENT.

A. The Defendant Caused the Device Which Is in Evidence as Exhibit 9 to Be Delivered for Introduction Into Interstate Commerce.

Appellant is in the business of manufacturing and selling "Drown Radio Therapeutic Instruments." Her place of business is in Hollywood, California, where she operates under the fictitious name of Drown Laboratories.

On October 28, 1948, appellant sold one of these instruments to Mr. Edgar C. Rice of Blue Island, Illinois, for the use of Mrs. Rice in treating herself at her home in Blue Island to eliminate a lump in her breast and prevent cancer from developing. Blue Island is a suburb of Chicago.

While the transaction in question was consummated on October 28, 1948, in Hollywood, appellant had a number of preliminary contacts with the Rices in Chicago during the preceding six months—diagnosing Mrs. Rice, recommending treatment with the "Drown Radio Therapeutic Instrument," and giving the Rices promotional literature regarding that instrument.

The invoice of sale states Mr. Rice's Blue Island, Illinois, address. It is clear from the surrounding circumstances that the parties contemplated what actually occurred—namely, that Mr. Rice would take the instrument back to his home where his wife would use it to treat herself in accordance with the directions appellant furnished Mr. Rice.

It was also contemplated by the parties that appellant would maintain "professional" supervision over Mrs.

Rice's progress, by direct personal contact when appellant was in Chicago, by correspondence with the Rices, and by long distance "radio" diagnoses from Hollywood.

During the following nine months, appellant did make direct and "radio" diagnoses of Mrs. Rice and did correspond with the Rices, giving additional directions for the use of the instrument and finally suggesting that Mrs. Rice have the breast with the lump removed.

Appellant was fully aware of the out-of-state destination and intended use of the device. When she caused its sale and delivery to Mr. Rice on October 28, 1948, she caused its "delivery for introduction into interstate commerce" within the meaning of 21 U. S. C. 331 (a). In *United States v. Sanders,* ..... F. 2d ..... (C. A. 10, May 7, 1952) (opinion appears as Appendix A of this brief), the Court of Appeals for the Tenth Circuit so held on similar facts.

Such a holding gives meaning to the plain language of the statute and is consistent with the liberal construction the Courts have given the Federal Food, Drug, and Cosmetic Act to protect the consumer and prevent misuse of the channels of interstate commerce.

Congress has ample power under the commerce clause to regulate transactions such as the one in question.

B. The Criminal Information Is Not Fatally Defective in Any Respect.

Appellant argues that there are a number of defects in the Information. Under Criminal Rule 12(b)(2), such matters must be raised by motion before trial. No such motion was made.

In addition to being untimely, appellant's assertion is without merit.

The Information, far from being inadequate, follows Form 11 of the Appendix of Forms of the Federal Rules of Criminal Procedure, pleading all of the facts required by that Form and much more.

The Information describes the instrument in question with considerable particularity. While appellant now professes to be uncertain as to the instrument and transaction referred to by the Information, she had no difficulty in identifying and stipulating to the instrument and transaction in the lower court.

Appellant's contention that the device is harmless and therefore should be exempted from the requirements of 21 U. S. C. 352 (f) (1) is doubly fallacious. An inert device is dangerous if relied upon by a person suffering from a serious ailment. A worthless device is not harmless if its use lulls a victim into postponing competent treatment for a disease like cancer. Moreover, 21 U. S. C. 352 (f) does not contemplate that a device should be exempted from bearing adequate directions for use in its labeling merely because it is harmless.

At any rate, it is settled that statutory exceptions are matters of defense, constitute no part of the necessary description of the offense, and need not be negatived by the Government in its pleadings.

The Information is not "redundant and multifarious" by reason of its inclusion of certain charts and letters in describing the "labeling" of the device, though such charts and letters were not written until after the sale of the device. It is settled that literature need not physically accompany a device during its interstate journey to com-

prise its "labeling" where, as here, the literature and the device are part of an integrated transaction. Furthermore, appellant stipulated that such charts and letters are "labeling."

The Information is not duplicitous. It was proper to charge that the device sold to Mr. Rice was misbranded in that its labeling contained (1) false and misleading *therapeutic* claims about that device, and (2) false and misleading *diagnostic* claims about another device. The statute condemns labeling that is false or misleading "in any particular."

C. The Trial Court Did Not Err in Overruling the Defendant's Motion for an Instructed Verdict.

Defendant filed a Motion for Instructed Verdict at the close of the Government's case. The Motion was denied, and the defendant then offered its evidence comprising 525 pages of testimony. Defendant thereby waived the Motion and since she did not renew it at the close of all the evidence, it need not be considered on appeal.

In any event, the Motion was without merit and was properly denied by the Court below.

The informed opinion testimony of persons highly qualified in the fields of medicine, engineering, and physics is substantial evidence. The Government relied not only upon such testimony but also upon the demonstrated inefficacy of the devices (1) in the case of Mrs. Rice and (2) in the tests which the defendant herself conducted at the University of Chicago, as described by Dr. Carpender.

The Government's evidence overwhelmingly establishes that the Drown devices are absolutely worthless in the diagnosis or treatment of any disease condition.

By introducing defendant's labeling to establish what claims were made for the devices, the Government obviously did not thereby establish the *truth* of those claims.

The credibility of witnesses is a matter for the jury. Witnesses for the Government were not prejudiced against the defendant because she is a chiropractor. Although a number of the Government's witnesses were physicians, there was no prejudice against the defendant on that account and, in fact, one of the first Government witnesses, the Secretary of the California State Board of Chiropractic Examiners—like appellant, himself a chiropractor—testified the Board had examined one of the Drown devices in question and concluded it was worthless.

D. The Trial Court Did Not Err in Denying Defendant's Motions With Respect to a New Trial and Arrest of Judgment.

Defendant's motions for a new trial and in arrest of judgment were filed 28 days after verdict and were not based on newly discovered evidence. Under Criminal Rules 33 and 34, these motions came too late.

In denying these motions, the trial court not only did so on jurisdictional grounds but also pointed out that defendant had had a fair trial and there was no basis on which to justify setting aside the verdict of the jury.

VI.

ARGUMENT.

A. The Defendant Caused the Device Which Is in Evidence as Exhibit 9 to Be Delivered for Introduction Into Interstate Commerce.

In section C of our Statement of the Facts, *supra,* we discussed rather fully the facts which comprise the interstate transaction in this case. The essential and undisputed elements include the following:

(1) The defendant resides in Hollywood, California, and does business there under the fictitious name of Drown Laboratories.

(2) The purchaser of the Drown radio therapeutic instrument [Ex. 9], Mr. Edgar C. Rice, and his wife, the intended user of the instrument, reside in Blue Island, Illinois, and this fact was known to the defendant at the time of the purchase in question.

(3) The defendant first met and diagnosed Mrs. Rice in Chicago, Illinois, on April 23, 1948. The defendant then suggested that Mrs. Rice obtain treatments in Chicago from a disciple of hers, a Dr. John, who used one of the defendant's radio therapeutic instruments. Defendant at the same time in Chicago also furnished the Rices with a copy of the circular, in evidence as Exhibit 2, which contains most of the fantastic therapeutic and diagnostic claims in question, and which may properly be considered one of the important factors that eventually induced the Rices to purchase the device that is Exhibit 9.

(4) Four months later, in September of 1948, the defendant again examined Mrs. Rice at Chicago and recommended continuation of the treatment with the Drown instrument.

(5) The following month, the Rices decided to buy a Drown instrument for Mrs. Rice's use in treating herself at her home in Blue Island, Illinois. Mr. Rice, in Los Angeles on a business trip, went to the defendant's place of business—the Drown Laboratories—at Hollywood on October 28, 1948. There he conferred with both the defendant and with Zella Koerner, a sales representative of the defendant. Miss Koerner handled the mechanics of selling the machine to the defendant, such as preparing the invoice of sale, collecting the money, and giving Mr. Rice a receipt. Mr. Rice also obtained another copy of the circular, Exhibit 2. The defendant, in addition to approving the sale [see Ex. 1], took care of the "professional" aspects of the transaction (1) by preparing a leaflet of instructions [Ex. 3] explaining how Mrs. Rice should use the instrument in treating herself, and (2) by giving that leaflet to Mr. Rice.

(6) The invoice of sale [Ex. 1] is a printed form bearing the heading "Drown Laboratories, Manufacturers of Drown Radio Therapy and Radio Vision Instruments, 7509 Sunset Boulevard, Hollywood, Calif." It describes the instrument and gives its model number, serial number, sales price, and tax. It also declares that the instrument was sold to "Mr. Edgar Rice, 13005 Greenwood Ave., Blue Island, Illinois."

(7) As contemplated by the parties to this transaction, Mr. Rice then took the instrument back to his home in Blue Island, Illinois, for the use of his wife, who thereupon discontinued taking treatments from Dr. John and began self-treatments with this instrument in her home, directly and by "radio" control. [R., Vol. 7, pp. 47-48; Vol. 1, pp. 26-27, and 31.]

(8) Subsequently, the defendant corresponded with the Rices, made diagnoses of Mrs. Rice by long distance "radio" control, and sent directions for Mrs. Rice's further self-treatment in her home in Illinois with the device Mr. Rice had purchased. [Exs. 4, 5, 6, 7, and 8; R., Vol. 7, pp. 48-50.]

From the foregoing summary, it is clear that the defendant herself stimulated the interest of the Rices in the purchase of the Drown radio therapeutic instrument for Mrs. Rice's use at her home in Blue Island, Illinois. Both by her personal advice and through her circular, Exhibit 2, defendant led them to believe that her instrument had miraculous healing power.

It is immaterial that the clerical aspects of the sale were handled by her sales representative, Zella Koerner. In *United States v. Dotterweich,* 320 U. S. 277 (1943), the Supreme Court held that a corporate officer could be found criminally responsible for the corporation's interstate shipments of violative drugs though he had no personal connection with the shipments.[2] On page 284, the Court observed:

> "Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial . . . The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be

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[2]For a fuller statement of the facts, see the opinion of the Court of Appeals, *United States v. Buffalo Pharmacal Co., Inc., and Dotterweich,* 131 F. 2d 500, 501 (C. A. 2, 1942).

> under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

See also *United States v. Parfait Powder Puff Co., Inc.*, 163 F. 2d 1008 (C. A. 7, 1947), cert. den. 332 U. S. 851. In the instant case, the defendant *was* personally and intimately connected with the transaction, some of the details of which were handled by her sales representative acting in the name of "Drown Laboratories"—the fictitious name under which the defendant does business.

However, defendant's main argument is that since Mr. Rice bought the instrument at her place of business in Hollywood, the transaction was wholly intrastate within the State of California. The complete and most persuasive answer to this argument is the recent opinion of the Court of Appeals for the Tenth Circuit in *United States v. Sanders,* ..... F. 2d ..... (May 7, 1952), rejecting an identical defense argument. Since that opinion is on all fours with this phase of the instant case and since it has not yet been reported, we are including it verbatim in our brief as Appendix A.

The *Sanders* case was a criminal contempt proceeding charging the defendant with violating an injunction which restrained him from shipping a misbranded drug in interstate commerce. Following the issuance of the injunction, Sanders sold his misbranded drug only to customers who came to his place of business in Oklahoma, and he deliv-

ered the drugs to them there. He was charged with violating the injunction by making six such sales and deliveries to out-of-state customers who, he knew, intended to return to their homes in the other States with the drugs. Sustaining the Government's position, the Court said in part:

> "As stated by the Supreme Court in United States v. Walsh, 331 U. S. 432, 434, 'The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. * * * It is in that interstate setting that the various sections of the Act must be viewed.' The Act must be given a reasonable construction to effectuate its salutary purposes. *It prohibits not only the introduction into interstate commerce of adulterated articles but also the delivery thereof for introduction into interstate commerce. One is as much a violation of the Act as the other* . . . The decisions . . . make it clear that whether delivery for transportation is made to a common carrier, a private carrier, or even to the purchaser for transportation by himself is immaterial.
>
> "To be guilty of violating the Act, it was not necessary that appellee be engaged in interstate commerce with respect to a misbranded drug. It was sufficient if he was engaged *in delivering such a drug for introduction into interstate commerce.*" (Emphasis added.)

By this decision, the Court gave meaning to each word in the statutory prohibition of 21 U. S. C. 331 (a):

> "The introduction or delivery for introduction into interstate commerce . . ."

The defendant's construction of this statute would erase the words "or delivery for introduction." It is fundamental that the Courts will strive to construe legislation so as to give full significance to every word. *Ginsberg & Sons, Inc. v. Popkin,* 285 U. S. 204, 208 (1932). Speaking of this Act, the Supreme Court observed in *United States v. Dotterweich,* 320 U. S. 277, 280 (1943):

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."

In construing the jurisdictional scope of the Federal Food, Drug, and Cosmetic Act, the Courts have consistently recognized the Congressional design to give maximum protection to the ultimate purchaser through the broadest constitutional regulation of interstate commerce.

The giving of a guaranty falsely assuring that a drug is not in violation of the Federal Food, Drug, and Cosmetic Act is prohibited by the Act though the drug has not been shipped interstate. *United States v. Walsh,* 331 U. S. 432, 437 (1947). "By this means, some of the evils which Congress sought to eliminate are cut down at their source and the effectiveness of the Act's enforcement is greatly enhanced."

Causing articles to become misbranded after they have moved in interstate commerce is in violation of the Act "without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the

interstate shipment." *United States v. Sullivan,* 332 U. S. 689, 696 (1948).

A device that is misbranded when introduced into and while in interstate commerce is subject to seizure and condemnation under the Act at any time thereafter, even in the home of the purchaser. *United States v. Olsen,* 161 F. 2d 669, 671 (C. A. 9, 1947), cert. den. 332 U. S 768.

A food that is manufactured and sold within the same State is subject to seizure and condemnation if it contains an adulterated ingredient of an interstate source. *United States v. Allbrook Freezing & Cold Storage, Inc.,* 194 F. 2d 937, 939 (C. A. 5, 1952).

As the Supreme Court pointed out in *United States v. Urbuteit,* 335 U. S. 355, 357-358 (1948):

> "The Act is not concerned with the purification of the stream of commerce in the abstract. The problem is a practical one of consumer protection, not dialectics."

See also *Kordel v. United States,* 335 U. S. 345, 351 (1948).

It is clear from the legislative pattern that the Act contains a comprehensive scheme of regulation in which no "loopholes" are to be tolerated. [See 21 U. S. C. 331 (a), (b), (c), (k), and 334 (a)]. Nor will the Courts lightly open "an escape valve" that will nullify the beneficent purpose of the law. *Alberty Food Products v. United States,* 194 F. 2d 463, 464 (C. A. 9, 1952).

Basic concepts regarding Congressional authority need little amplification. The power of Congress to regulate interstate commerce is plenary in scope, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbons v. Og-*

den, 9 Wheat. 1, 196 (1824); *Second Employers' Liability Cases,* 223 U. S. 1, 47 (1912). It is no objection to the exertion of the power that its exercise is attended by the same incidents which attend the exercise of the police power of the States. *United States v. Carolene Products Co.,* 304 U. S. 144, 147 (1938).

The power under the commerce clause extends to every instrumentality or agency by which interstate commerce is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *The Minnesota Rate Cases,* 230 U. S. 352, 399 (1913). It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, 119 (1942); *National Labor Relations Board v. Fainblatt,* 306 U. S. 601, 605-606 (1939). The power includes the ability to deal with a host of acts which are not in themselves interstate commerce but, because of their relation to and influence upon interstate commerce, come within the power of Congress. *United States v. Ferger,* 250 U. S. 199, 203 (1919); *Weiss v. United States,* 308 U. S. 321, 327 (1939). Note *Brooks v. United States,* 267 U. S. 432 (1925). Congress may adopt not only means which are necessary, but those which are convenient, to the exercise of the commerce power, *Seven Cases v. United States,* 239 U. S. 510, 515 (1916), and may itself determine the means appropriate for this purpose. *McDermott v. Wisconsin,* 228 U. S. 115, 128 (1913). Transportation is not the exclusive test of the

scope of congressional authority under the commerce clause. *Chicago & N. W. Ry. Co. v. Bolle,* 284 U. S. 74, 78 (1931); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 291 (1921).

Congress may not only prevent the interstate transportation of a proscribed product but may also "stop the initial step toward (such) transportation, (namely) production with the purpose of so transporting it. *United States v. Darby,* 312 U. S. 100, 117 (1941).

Nor is the place of sale or the passage of title material. In *N. L. R. B. v. Levaur,* 115 F. 2d 105, 108-109 (C. A. 1, 1940), cert. den. 312 U. S. 682, the Court said:

> "It is not in the least significant that the sales are so made that title passes to the purchaser within Rhode Island. It has long been held that a sale involving interstate transportation is not removed from Congressional regulation because the sale itself is intrastate, either before or after the transportation." (Citing authorities.)

See also *Barnes v. United States,* 142 F. 2d 648, 651 (C. A. 9, 1944) and *Arner Co., Inc. v. United States,* 142 F. 2d 730, 733-734 (C A. 1, 1944), cert. den. 323 U. S. 730. "The Act is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution." *United States v. Dotterweich,* 320 U. S. 277, 283 (1943).

A situation closely analogous to the instant case arose in an injunction suit under the Fair Labor Standards Act in *Tobin v. Grant,* 79 Fed. Supp. 975 (N. D. Calif., 1948). Defendants in California manufactured bank books, check books, and union membership books, as well as book covers. On the books and covers, defendants embossed the

names and out-of-state addresses of the organizations for whose use they were designed. Defendants then delivered these books and covers to their customers in California who thereafter shipped them to the out-of-state organizations whose names and addresses appeared thereon. The statutory provision there involved declared in part that no person "shall ship or deliver for shipment in commerce . . ." In the carefully considered opinion of Judge Harris, the contentions of the defendants there, similar to those raised here, were rejected:

Pages 976-977

> "Defendants argue that knowledge of the ultimate destination of their product is immaterial. They claim that the manner of consummating their sales, with title passing to an intrastate purchaser, is controlling.
>
> "When title passed is entirely irrelevant. (Citing cases.) Rather, the Court must ascertain whether articles were delivered in California for shipment in interstate commerce. Patently, they were—as their ultimate destination was made manifest from the clear imprint on the articles.
>
> "Defendants have assumed to place some significance in the fact that the articles were not delivered to a carrier and argue, therefore, that the manufactured products were not delivered for shipment. Delivery to a carrier is not the test. (Citing authorities.)"

See also *United States v. Simpson,* 252 U. S. 465 (1920).

Appellant cites a number of cases dealing with the power of states to tax particular types of transactions apparently in an effort to establish that the instant trans-

action is beyond the power of Congress to regulate interstate commerce. But the Supreme Court has warned on a number of occasions that merely because the Court upholds the validity of a state taxing statute as not imposing an undue burden on interstate commerce, it does not follow that the transaction to which the tax is applied "is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States." *Swift and Company v. United States,* 196 U. S. 375, 400 (1905); *Minnesota v. Blasius,* 290 U. S. 1, 8 (1933); *Stafford v. Wallace,* 258 U. S. 495, 525 (1922); *Board of Trade of the City of Chicago v. Olsen,* 262 U. S. 1, 33 (1923).

Defendant argues that the sale to Mr. Rice was an isolated transaction and that "the evidence shows from the stipulation of facts she was not in the business any way of selling such instruments, either locally or otherwise." (App. Op. Br. p. 32, line 16) Even if this assertion were true—and it is not since there is no such stipulation—, it would be of no comfort to defendant, for the statutory prohibition against the delivery of a misbranded device for introduction into interstate commerce (21 U. S. C. 331 (a)) is not qualified by a requirement that the Government prove such delivery was one of a series or part of the regular conduct of a business. *Every* such delivery is prohibited.

Actually, the Record here plainly reflects that the defendant *was* engaged in the business of selling her instruments. The invoice of sale [Ex. 1] is made out on a printed form which obviously contemplates repeated sales of Drown instruments. Thus, the invoice refers to defendant's business as "Manufacturers of Drown Radio Therapy and Radio Vision Instruments"; it calls for the

insertion of information always associated with sales on a substantial scale such as order number (in this case, No. 177), customer's number, identity of salesman, terms of sale, quantity, model number, serial number, warranty and disclaimer, etc. The printed Exhibits 2 and 3 are additional strong evidence of sales promotional activity. Also noteworthy is the fact that the defendant employed a *sales representative,* Zella Koerner, to handle the details of sales of her instruments. [R. Vol. 7, p. 47.] Furthermore, Dr. John of *Chicago, Illinois,* gave treatments on a Drown instrument to Mrs. Rice. [R., Vol. 7, pp. 47 and 51.]

We submit, and the Record amply confirms, that the defendant was fully cognizant of the out-of-State destination and use of Exhibit 9, and that she caused said device to be delivered for introduction into interstate commerce.

B. The Criminal Information Is Not Fatally Defective in Any Respect.

Appellant's assertion that the Information is defective in a number of respects is without merit and comes too late. (App. Op. Br. pp. 39-48.) Criminal Rule 12 (b) (2) requires that such defenses and objections be raised only by motion before trial. (See *Cratty v. United States,* 163 F. 2d 844, 849 (D. C. Apps., 1947).) No such motion was made.

The first alleged defect is that the Information does not state how or in what manner the unlawful act was done. Form 11 of the Appendix of Forms approved by the Supreme Court in adopting the Federal Rules of Criminal Procedure is entitled "Information for Food and Drug

Violation." A comparison of Form 11 with the Information filed in this case [R., Vol. 7, p. 2] establishes that the Government pleaded every element which the Supreme Court has deemed essential, and much more. The Information contains a description of the unlawful act, the time it transpired, the device in question, the labeling, and the multitude of respects in which the device was misbranded. Plainly, no more is needed.

Appellant's complaint that the device is not sufficiently described is difficult to understand since the Information specifies its name, model number, and serial number. [R., Vol. 7, p. 2.] This data corresponds with the Stipulation as to Facts [see R., Vol. 7, pp. 47-48, and Ex. 1] where defendant had no difficulty in identifying and stipulating to the device and transaction in question.

Nor is there any merit to the argument that it is improper to plead that a "device" is misbranded, and that the pleading should be in the language of the statutory definition of the term "device." Form 11 uses the word "food"; if it were couched in the language of the statutory definition of the term "food" (21 U. S. C. 321(f)), it would say "articles used for food." See also the definitions of drug and cosmetic. (21 U. S. C. 321(g) and (i).) And the cumbersome pleading suggested by appellant would moreover violate the requirement that the information "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." (Criminal Rule 7(c).)

With respect to the violation of 21 U. S. C. 352(f)(1) charged in the Information, appellant's contention is again without merit. That section declares that a drug or device is misbranded unless its labeling bears adequate directions for use. The section further directs the

Federal Security Administrator to promulgate regulations exempting drugs and devices from having adequate directions for use in their labeling if not necessary for the protection of the public health. The Administrator has promulgated such regulations, specifying the conditions under which a drug or device may be so exempt. (21 Code of Federal Regulations (1949 Ed.) Sec. 1.106(b)-(k), pp. 17-18.)

Appellant's argument on this point is difficult to follow. First it is said that the use of the instrument in question "could not possibly harm any human being." (App. Op. Br. p. 44, line 24.) The harm done to Mrs. Rice belies this statement. See also the testimony of Dr. Elmer Belt. [R., Vol. 1, p. 109.] And in *Ewing v. Mytinger & Casselberry,* 339 U. S. 594, 600 (1950), the Supreme Court said:

> ". . . public damage may result even from harmless articles if they are allowed to be sold as panacease[3] for man's ills . . . For all we know, the most damage may come from misleading or fraudulent labels." (Footnote added.)

See also *United States v. Kordel,* 164 F. 2d 913, 916-917 (C. A. 7, 1948), affirmed 335 U. S. 345. Pertinent here is an observation made by the Court in *United States v. 6*

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[3]Here, defendant's labeling declares: "We do not claim our method of treatment to be a panacea. There are some conditions which no known therapy has been able to control. *We do claim, however, that this instrument far surpasses any other known method of diagnosis or therapy,* because it uses natural methods and because those methods have a scientifically accurate foundation." [Ex. 2—emphasis added.]

Devices, "Electreat Mechanical Heart," 38 Fed. Supp. 236, 238 (W. D. Mo., 1941):

> "From a practical standpoint, the benefit to be derived from the use of the instrument was tersely stated by one of the several leading physicians of Kansas City, to be that the use of the instrument would not injure one if there was nothing the matter with him, but that if a person was suffering from any disorder or ailment its use might and probably would be injurious."

Upon the fallacious premise that the device is harmless, appellant then seems to assert that it should have been exempted by the regulations from bearing adequate directions for use in its labeling, and that somehow this comprises a defect in the Information. But there is no statutory mandate directing the Administrator to exempt all harmless drugs and devices, or to refuse exemption to articles that are not harmless. See *Alberty Food Products v. United States,* 194 F. 2d 463, 464 (C. A. 9, 1952). The statutory criterion is whether adequate directions for use in the labeling are "necessary for the protection of the public health." Thus the regulations deem such directions unnecessary even with respect to *potent* drugs and devices if the articles are to be dispensed upon the prescription of a physician.[4] (See *United States v. El-O-Pathic Pharmacy,* 192 F. 2d 62, 74-75 (C. A. 9, 1951).)

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[4]Legislative ratification of this viewpoint appears in recent Congressional action amending the Act to tighten the controls over drugs which should be dispensed on prescription only. [Public Law 215, 82d Cong., Ch. 578, 1st Sess., H. R. 3298, approved October 26, 1951.] This amendment defines the categories of drugs that must be sold on prescription only, and expressly exempts such drugs from bearing adequate directions for use in their labeling.

If a device comes within the exemption regulations, that is a matter of affirmative defense which must be raised and proved by the defendant. *Ocean Accident & Guaranty Corp. v. Rubin,* 73 F. 2d 157, 166 (C. A. 9, 1934), 96 A. L. R. 412; *McKelvey v. United States,* 260 U. S. 353, 357 (1922); *People v. Fowler,* 84 P. 2d 326, 329-330 (Appellate Dept. Sup. Ct., L. A. County, Calif., 1938). For a well-considered opinion applying this principle and holding that certain devices did not comply with the exemption regulations, see *United States v. 22 Devices . . . Halox Therapeutic Generator,* 98 Fed. Supp. 914 (S. D. Calif., 1951).

It is settled that statutory exceptions are matters of defense, constitute no description of the offense, and need not be negatived by the Government in its pleadings. *McKelvey v. United States,* 260 U. S. 353, 356-357 (1922); *Frederick v. United States,* 163 F. 2d 536, 544 (C. A. 9, 1947), cert. den. 332 U. S. 775.

Another contention of appellant is that the Information is "redundant and multifarious." Defendant appears to be arguing that the Information improperly describes certain circulars, letters, and charts as "labeling," since some of that material (charts and letters) was not in existence at the time when the device was sold to Mr. Rice. But it was *stipulated* that all of this material was part of the labeling of this device. [R., Vol. 7, pp. 48-50.] Moreover, it is settled that literature need not physically accompany a drug or device during its interstate journey in order to comprise "labeling" within the meaning of 21 U. S. C. 321(m)(2). See *Kordel v. United States,* 335 U. S. 345 (1948), sustaining a holding that booklets shipped a year and a half after certain

drugs constituted the "labeling" of the drugs since they were, as here, part of an integrated transaction.

Appellant also seems to be asserting that the Information is duplicitous because it charges the device sold to Mr. Rice was misbranded in that its labeling contained (1) false and misleading *therapeutic* claims about that device, and (2) false and misleading *diagnostic* claims about another device. The pertinent statute reads:

21 U. S. C. 352

"A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading *in any particular.*" (Emphasis added.)

An interpretive regulation of the Federal Security Administrator adopted under authority of 21 U. S. C. 371(a) reads:

21 C. F. R. (1949 Ed.) Sec. 1.101 (p. 12):

"*Drugs and devices; labeling, misbranding*

(a) Among representations in the labeling of a drug or device which render such drug or device misbranded is a false or misleading representation with respect to *another* drug or device or a food or cosmetic." (Emphasis added.)

The statutory language "in any particular" is broad and unqualified. If the labeling of a device makes false and misleading claims about that device *and* about another device, the Government may predicate its charges upon all such claims. See *United States v. 95 Barrels . . . Apple Cider Vinegar,* 265 U. S. 438, 442-443 (1924), where the Supreme Court said with reference to an iden-

tical provision in the Federal Food and Drugs Act of 1906:

> "The statute is plain and direct. Its comprehensive terms condemn *every* statement, design and device which may mislead or deceive." (Emphasis added.)

During the trial, defendant made no objection to the introduction of the *diagnostic* device referred to [Ex. 11] or to the extensive testimony relating to such device.[5]

Nor is there any valid objection to stating in one count the various modes in which the device [Ex. 9] was misbranded. See *Crain v. United States,* 162 U. S. 625, 636 (1896); *Frederick v. United States,* 163 F. 2d 536, 544 (C. A. 9, 1947), cert. den. 332 U. S. 775.

We submit that the rule laid down by this Court in *Woolley v. United States,* 97 F. 2d 258, 261 (C. A. 9, 1938), cert. den. 305 U. S. 614, was fully complied with in this case:

> "It is not necessary that an indictment set forth a myriad of detail, or that it satisfy every objection which human ingenuity can devise. It is enough if it charges every substantial element of the offense and at the same time apprises the accused of the charge against him in such manner that he can prepare his defense without being taken by surprise, and that he have the assurance that he will be protected against another prosecution for the same offense."

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[5]At one point, defense counsel did object to a particular line of inquiry upon some ground remote from what is now urged here, and then in effect withdrew his objection. [R. Vol. 2, pp. 430-433.]

C. The Trial Court Did Not Err in Overruling the Defendant's Motion for an Instructed Verdict.

At the close of the Government's case, the defendant filed a Motion for Instructed Verdict. [R., Vol. 7, p. 16.] This Motion was denied by the trial court. [R., Vol. 3, p. 499.] No similar motion was made at the close of all the evidence. Defendant, by offering evidence after the motion was denied and not renewing the motion at the close of all the evidence, effectively waived that motion so that it need not be considered on appeal.[6] *Mosca v. United States,* 174 F. 2d 448, 450-451 (C. A. 9, 1949).

Nevertheless, an examination of that motion shows it to be without merit. A motion for a judgment of acquittal is directed to the sound discretion of the trial court and will not be disturbed in the absence of a showing of abuse of discretion. *Ng Sing v. United States,* 8 F. 2d 919, 920 (C. A. 9, 1926). On such a motion, it is well established that the evidence must be considered in the light most favorable to the party against whom it is urged, and that the motion will be denied if substantial evidence has been introduced sufficient to take the case to the jury. *Garber v. United States,* 145 F. 2d 966, 969 (C. A. 6, 1944).

Appellant is in error in stating that her Motion for Instructed Verdict raised the jurisdictional question.

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[6]The 525 pages of defense testimony—*e. g.,* pages 499-1024 of the Reporter's Original Transcript of Proceedings—have been certified to this Court pursuant to appellant's initial designation, but were not designated by appellant as material to the appeal. [R. Vol. 7, pp. 43-44.]

(App. Op. Br. p. 48, line 13.) In fact, the Motion itself gives the following as a ground for a directed verdict [R., Vol. 7, pp. 16-17]:

> "Because the Government has failed to prove its case, beyond a reasonable doubt, in any particular charged in the information, *except the stipulation with reference to the introduction, or delivery for introduction, into interstate commerce, the device complained of by the government,* and said stipulation of itself not being sufficient to be the basis of a verdict of 'guilty,' without the government having proved, beyond a reasonable doubt, that said device was misbranded *at the time of said stipulated introduction or delivery for introduction, into interstate commerce.*" (Emphasis added.)

Thus, the Motion speaks of a "stipulated introduction or delivery for introduction into interstate commerce."

A considerable part of the Government's medical and physical testimony was based upon the informed opinion of highly qualified persons. Defendant's Motion seems to argue that such testimony is insubstantial. However, it is settled that such testimony is substantial. *Reilly v. Pinkus,* 338 U. S. 269, 274 (1949); *Research Laboratories, Inc. v. United States,* 167 F. 2d 410, 416-417 (C. A. 9, 1948), cert. den. 335 U. S. 843; *United States v. One Device, Intended For Use As A Colonic Irrigator,* 160 F. 2d 194, 199 (C. A. 10, 1947). Moreover, much of the Government's testimony dealt with the demonstrated inefficiency of this device to eliminate the lump in Mrs. Rice's breast and to prevent cancer therefrom. In addition, the testimony of Dr. Carpender described actual tests that were conducted by the defendant herself at the University of Chicago.

The shotgun nature of the Motion for Instructed Verdict challenges the Government's proof with respect to each *therapeutic*[7] claim alleged to be false and misleading. We submit that the Government's physical and medical testimony, summarized earlier in this brief, overwhelmingly establishes that the Drown devices are absolutely worthless in the diagnosis or treatment of *any* disease condition, though it may be noted that it is not incumbent upon the Government to prove that each of the therapeutic and diagnostic claims is false and misleading; such proof regarding any one of them is sufficient. *United States v. One Device, Intended For Use As A Colonic Irrigator,* 160 F. 2d 194, 200 (C. A. 10, 1947); see also *Crain v. United States,* 162 U. S. 625, 636 (1896); *Frederick v. United States,* 163 F. 2d 536, 544 (C. A. 9, 1947), cert. den. 332 U. S. 775.

Still discussing the Motion for Instructed Verdict, appellant raises a curious argument, contending that the "case histories" set forth in her circular, which is Exhibit 2 in evidence, are "positive proof of the claims of appellant that said device does treat efficaciously such diseases and infirmities." (App. Op. Br. p. 55, line 7.) Such "case histories" provide the basis for most of the claims which the Information alleges are false and misleading. The circular was introduced into evidence for the purpose of establishing that such claims were actually made in defendant's labeling. To say that the introduction of the evidence establishing the claims alleged to be false, automatically establishes the truth of such claims is, we submit, to state an absurdity. Under such circumstances,

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[7]The Motion is silent with respect to the *diagnostic* claims which the Information charges are false and misleading.

there could never be a successful proceeding against any nostrum and defendants could act with impunity behind the sheltering cover of testimonials, "case histories," and "the doctors say." See *United States v. John J. Fulton Co.,* 33 F. 2d 506, 507 (C. A. 9, 1929).

In passing, defendant makes reference to the Government's medical witnesses as members of the American Medical Association, declaring that they were prejudiced against the defendant presumably because she is a chiropractor. (App. Op. Br. p. 56, line 18.) So unwarranted an inference would not be ground for relief here in any event, such matters being determined by the jury under appropriate instructions. See *Barone v. United States,* 94 F. 2d 902, 903 (C. A. 9, 1938). But it is worthy of note that one of the first Government witnesses was Dr. Willard W. Percy, D. C., secretary of the California State Board of Chiropractic Examiners, who testified that the Board had examined one of the defendant's devices in question and concluded it was worthless. [R., Vol. 1, pp. 63-85.]

We submit that the Motion for Instructed Verdict was properly denied by the District Court without any abuse of discretion, and that the Motion was subsequently waived.

D. The Trial Court Did Not Err in Denying the Defendant's Motions With Respect to a New Trial and Arrest of Judgment.

The jury's verdict of guilty was brought in on September 24, 1951 [R., Vol. 7, p. 23.] On October 22, 1951, defendant filed a Motion for a New Trial. [R., Vol. 7, p. 25.] This Motion was not based on any newly discovered evidence. [R., Vol. 5, p. 1118.]

On October 22, 1951, defense counsel also asked he be given permission to file a motion in arrest of judgment a week later. [R., Vol. 5, p. 1118.]

Also on October 22, 1951, defense counsel asked for permission to file *"nunc pro tunc"* a motion for a new trial and a motion in arrest of judgment.

All of these motions were denied by the lower court which observed [R., Vol. 5, pp. 1119-1120]:

> "She had a long trial. It was before a jury. The defendant certainly was represented by competent counsel. We leaned over backwards to allow her to introduce certain evidence—in fact, the District Attorney many times thought we were too lenient in allowing her to introduce the testimony she wanted to introduce. She got a fair hearing, she got a fair trial, and the jury rendered its verdict. There is nothing in the world, as far as I know, to justify setting aside the verdict, ignoring the verdict of the jury."

The Court also remarked it doubted it had "any jurisdiction to grant either one of these motions" because they were made after the time permitted by the Federal Rules of Criminal Procedure. [R., Vol. 5, p. 1119.]

Motions for a new trial are governed by Rule 33. Motions in arrest of judgment are governed by Rule 34. Both Rules declare that the motions (other than a motion for a new trial based on newly discovered evidence) must be filed *within 5 days after verdict or within such further time as the court may fix during the 5-day period.* All of defendant's motions relating to a new trial and in arrest of judgment were made 28 days after the verdict and no extension of time was sought within the 5-day period following the verdict.

Under these circumstances, it is settled that the motions came too late and that the lower court was without jurisdiction to grant them even if it had wished to do so. *United States v. Smith,* 331 U. S. 469, 473-475 (1947); *Marion v. United States,* 171 F. 2d 185 (C. A. 9, 1949), cert. den. 337 U. S. 944.

VII.
Conclusion.

It is submitted that no error was committed by the lower court and that its judgment should be affirmed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals, Tenth Circuit. No. 4389—November Term, 1951.

United States of America, Appellant, vs. Tom G. Sanders, an individual, Appellee.

Appeal from the United States District Court for the Western District of Oklahoma.

[May 7, 1952.]

Robert E. Shelton, United States Attorney (James M. McInerney, Assistant Attorney General, John T. Grigsby and Vincent A. Kleinfeld, Attorneys, Department of Justice, and Paul S. Steffy, Attorney, Federal Security Agency, were with him on the brief) for Appellant.

Charles E. Dierker for Appellee.

Before Bratton, Huxman and Pickett, United States Circuit Judges.

Huxman, Circuit Judge.

On October 17, 1951, an injunction was entered against appellee, Tom G. Sanders, in the United States District Court for the Western District of Oklahoma, enjoining him from directly or indirectly introducing or causing to be introduced, and delivering or causing to be delivered, for introduction into interstate commerce, in violation of 21 U. S. C. 331 (a), a drug which was misbranded within the meaning of 21 U. S. C. 352 (b) (1), 352 (b) (2), 352 (e) (2) and 352 (f) (1). Thereafter this action was filed in the nature of an application for an order to show

cause why he should not be prosecuted for criminal contempt for a violation of the injunction.

Appellee, defendant below, filed a response to the order to show cause and moved that appellant's application be quashed and that no citation to show cause be issued. A hearing was had on appellee's motion. Judgment was entered denying appellant's application for a citation to show cause. While the trial court made findings of fact and conclusions of law, they are based entirely upon the allegations of the application for the show cause order and the statements of the parties at the time of the hearing thereof and not upon evidence introduced bearing upon the issue of appellee's guilt. That issue could not be before the court for determination until a show cause order had issued. Neither did the decree of the court attempt to pass upon the guilt or innocence of appellee. It merely denied the application for a show cause order on the ground that the allegations of the application were insufficient to state an offense.

Appellee's challenge to the jurisdiction of this court on the ground that the judgment of the trial court constituted an adjudication of guilt and is, therefore, not appealable is not well taken. It is clear that the trial court did not try the issue of guilt or innocence of the appellee. It merely passed upon the sufficiency of the allegations of the application to state an offense, if found true.

An application to show cause why defendant should not be prosecuted for criminal contempt is equivalent to an information charging criminal contempt, under Rule

42 (b) of the Federal Rules of Criminal Procedure, and a criminal contempt proceeding is a criminal case within the meaning of 18 U. S. C. 3731. An order dismissing a criminal contempt proceeding is appealable under the Criminal Appeals Act.[1]

It is admitted that the drug in question was misbranded. Appellee's position adopted by the court is that his activities do not constitute interstate commerce as prohibited by the injunction. Prior to the injunction, appellee engaged "runners" or "drummers" who went into states other than Oklahoma and solicited orders for the drug. After the injunction, this method of doing business was discontinued. Appellee sold only to those who came to his place of business at Wanette, Oklahoma, and delivered the drugs to them there. Many of these customers came from states other than Oklahoma.

The application for the order to show cause among others alleged that since the issuance of the injunction appellee had at various times and with full knowledge and notice delivered or caused to be delivered for introduction into interstate commerce various quantities of the misbranded drug; that on January 24, 1951, he sold and delivered to Loyd Mangan of Garden City, Kansas, for introduction into interstate commerce two one quart jars of said misbranded drug, with the knowledge that Mangan intended to and would return to Garden City, Kansas,

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[1]United States v. Goldman, 277 U. S. 229;
United States v. Hoffman, 161 F. 2d 881.

with said article or drug. The complaint alleged five other specific sales made to out of state customers and alleged that all of said sales were made with the knowledge that the purchaser was from out of the state and intended to and would return to his place of residence out of the state with said drugs. It alleged that while appellee ostensibly discontinued the practice of using salesmen or so called "runners" to solicit and fill orders from customers outside of the state of Oklahoma he had adopted the practice of selling and delivering his products at Wanette, Oklahoma, directly to out of state customers, soliciting them to return at later dates for more of the product, knowing that at all times said misbranded drug would be transported in interstate commerce by said purchasers for use in other states; that by such conduct he was disregarding and circumventing the decree and was in truth and in fact continuing to engage in the interstate business in the misbranded drug and was indirectly introducing or causing it to be introduced into interstate commerce, in violation of the injunction. For the purpose of considering the correctness of the trial court's ruling on the motion for dismissal of the application, these allegations stand admitted and must be accepted as the facts.

As stated by the Supreme Court in United States v. Walsh, 331 U. S. 432, 34, "The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious,

adulterated and misbranded articles of the specified types. * * * It is in that interstate setting that the various sections of the Act must be viewed." The Act must be given a reasonable construction to effectuate its salutary purposes. It prohibits not only the introduction into interstate commerce of adulterated articles but also the delivery thereof for introduction into commerce. One is as much a violation of the Act as the other. There is a long line of cases beginning with Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, holding that where one purchases goods in one state for transportation to another the interstate commerce transaction includes the purchase as well as the transportation.[2] The court sought to distinguish the Dahnke-Walker case on the ground that the wheat purchased by a resident of Tennessee in Kentucky for transportation to Tennessee was delivered by the vendor to the vendee on board the cars of a common carrier, to be immediately forwarded to the purchaser's mills in Tennessee. The decisions, however, make it clear that whether delivery for transportation is made to a common carrier, a private carrier, or even to the purchaser for transportation by himself is immaterial.[3]

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[2]Addyston Pipe & Steel Co. v. United States, 175 U. S. 211;
United States v. Rock Royal Co-op., 307 U. S. 533;
United States v. Simpson, 252 U. S. 465;
Carter v. Carter Coal Co., 298 U. S. 238;
United States v. 7 Barrels, etc., 141 F. 2d 767.

[3]United States v. Simpson, 252 U. S. 465;
Tobin v. Grant, 79 F. Supp. 975.

To be guilty of violating the Act, it was not necessary that appellee be engaged in interstate commerce with respect to a misbranded drug. It was sufficient if he was engaged in delivering such a drug for introduction into interstate commerce. If appellee knowingly and regularly sold misbranded drugs and delivered them, knowing that they were purchased for transportation in interstate commerce, and solicited customers to return for future purchases and deliveries, he was guilty of a violation of the Act. The allegations of the complaint for a show cause order alleged that he did all of this and for the purpose of the motion they stand admitted as true. We accordingly conclude that stated an offense and that the trial court erred in dismissing the application for a show cause order.

The judgment is REVERSED and the cause is REMANDED with directions to proceed in conformity with the views expressed herein.

A true copy.

Attest:

Clerk U. S. Court of Appeals, Tenth Circuit.

No. 13245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF OF WESTERN AIR LINES, INC.

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Statement of the Case.[2]

1. Order Under Review.

In the Order challenged the Board purportedly suspended, but in fact revoked, Western's permanently certificated right to serve El Centro, California, and Yuma, Arizona, with air transportation of persons, property and mail in order that air transportation to those communities might be provided by Bonanza Air Lines, Inc. under a new certificate extending that feeder carrier's service from Phoenix, Arizona, to Los Angeles, California, by way of Ajo and Yuma, Arizona, Blythe, El Centro, San Diego, Oceanside, Laguna-Santa Ana and Long Beach, California. A copy of the Order appears as Appendix A to this brief.

In its Order and during the argument before this Court on Western's application for a Stay Order the Board conceded that the ejection of Western from El Centro and Yuma was a necessary prerequisite to the admission of Bonanza to the new route from Phoenix to Los Angeles.

The primary issue on this review concerns the right of the Board to eliminate a route segment of a permanently certificated carrier for the benefit of a new carrier under a purportedly temporary certificate. In order

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[2]On February 18, 1952, as a condition to the issuance of a Stay Order, Petitioner's brief was required to be filed within twenty days, Respondent's brief within twenty days thereafter, with ten days for a reply brief. This time limitation does not permit the printing of the portion of the record designated by the parties as material to a consideration of the review as required by Rule 19. Accordingly, citations to the record cannot be made and some liberties will have to be taken in referring to facts. Should reference be made to a fact which proves not to be in the record, upon the request of the Court or any party a supporting affidavit will be supplied.

that the fundamentals of the primary issue may be placed in sharper focus, a brief sketch of the origin and development of the trunk airlines and of the feeder airlines will be presented, with an outline of the origin and development of Western's service to the Imperial Valley.

2. History of Domestic Trunklines.

Privately operated commercial air transportation first drew breath twenty-six years ago as the direct consequence of the Air Mail Act of 1925, passed ". . . to encourage commercial aviation and to authorize the Postmaster General to contract for Air Mail Service." In the fall of 1925 the first air mail routes were awarded, with bids going to six private contractors, and scheduled commercial air transportation became fact the following spring. Of these pioneer carriers only Western, which inaugurated service between Los Angeles and Salt Lake City on April 17, 1926 with open-cockpit Douglas bi-planes, remains today flying under its own banner. The others have passed into obscurity or formed the nuclei of such present-day systems as American Airlines and United Air Lines.

Some 5,782 passengers were carried by scheduled airlines in 1926, a trifling figure which increased to a little better than 8,500 in 1927. Only a million and a half pounds of mail were transported by air in 1927, with 128 small single-engine aircraft in service.

This infant industry expanded slowly at first, but steadily. In the initial years of operation, air carriers were concerned almost wholly with mail service. It was the design, in part, of the Watres Act of 1930 to encour-

age passenger service. The decline of the securities market and business depression in the early 30's weeded out many carriers — some suspended services, others merged with larger companies. However, general progress and expansion continued until the Air Mail Act of 1934.

Under that act all air mail contracts were cancelled, and a system of competitive bidding for mail contracts was installed. Regulatory authority over airlines was vested in three governmental agencies, the Post Office Department in the awarding of mail contracts, the Bureau of Air Commerce in the prescribing of operational and safety standards, and the Interstate Commerce Commission in the regulating of rates to be paid for the carriage of mail. It was possible then for anyone to engage in air transportation and to compete for the carriage of passengers. The internecine competition and the unstable economic conditions which ensued within the industry are common knowledge.

In 1938, after extended hearings and debate, Congress remedied the situation with the enactment of the Civil Aeronautics Act, the basic charter of federal regulation in the field of aviation. That Act served to coordinate all functions involving air transportation under one independent governmental agency and to insure economic security and stability of operation with certificates of public convenience and necessity.

Since 1938 the dramatic advance of the air transportation industry in this country, during peace and in war, has exceeded all reasonable expectations. Few chapters in the annals of transportation can match the

progress which has been experienced by the domestic air trunklines, as revealed by this statistical tabulation:

	1938	1951
Domestic Air Trunklines	16	16
Route Miles in Operation	38,757	128,653[3]
Two-Engine Aircraft	229	422
Four-Engine Aircraft	0	405
Operating Property and Equipment	$22,919,000	$272,376,000[4]
Passengers Carried	1,365,706	19,734,000[5]
Revenue Passenger Miles Flown	51,619,000	9,680,057,000[5]
Mail Ton Miles Flown	7,500,000	57,818,000[5]
Total Operating Revenues	$27,047,000	$632,183,000[5]
Mail Pay	$15,800,000	$40,085,000[5]
Average Mail Pay per Mail Ton Mile	$2.12	$0.69[5]
Personnel	9,008	66,473

The operating results of the domestic trunkline system from 1938 to 1951, in terms of cost to the government, are significant. Revenue from air mail stamps totalled $641,027,503. Payments to the carriers amounted to $412,080,219, and the Post Office Department expended $277,865,011 in allocated internal costs. Thus, for the 13-year period a net cost to the Government of $48,917,727 was experienced or less than $3,800,000 per year, a small price to pay for the development of the finest air transportation system in the world, including the carriage of air mail.

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[3]Certificated route miles.
[4]As of September 30, 1951.
[5]Year ended September 30, 1951.

3. History of Feeder Airlines.

The year 1943 found the Civil Aeronautics Board deluged with some 233 applications for new air service to 3,097 communities of the nation, in comparison to the 288 cities then receiving certificated service, involving an increase in domestic route miles of 688%. This presented a unique problem to the Board, in that service to the communities involved, on the whole, did not appear warranted under normal economic considerations and existing standards of operation. Lacking information with which to meet and answer the claims put forth with great enthusiasm by the proponents of the feeder service, the Board instituted an investigation to determine the feasibility and need for a general expansion of domestic air services.[6]

Given the green light by the Board, the feeder experiment began to unfold. "Area" proceedings were instituted and beginning in 1946 with the award of two feeder routes in the *Rocky Mountain States Area Service* case, 6 C. A. B. 695, decisions were issued in rapid-fire order.[7] By 1948 sixteen new feeder carriers had been certificated to operate 21,000 new route miles, totals which by 1949 had increased to twenty new feeder carriers and 26,000 new route miles. Thus, "experimental" feeder operations were extended to substantially every part of the United States.

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[6] *Local, Feeder and Pick-Up Air Services*, 6 C. A. B. 1 (1944).

[7] *Florida Case*, 6 C. A. B. 765 (1946); *West Coast Case*, 6 C. A. B. 961 (1946); *New England Case*, 7 C. A. B. 27 (1947); *Texas-Oklahoma Case*, 7 C. A. B. 481 (1947); *North Central Case*, 7 C. A. B. 639 (1947); *Southeastern States Case*, 7 C. A. B. 863 (1947); *Great Lakes Area Case*, 8 C. A. B. 360 (1947); *Mississippi Valley Case*, 8 C. A. B. 726 (1947); *Arizona-New Mexico Case*, 9 C. A. B. 85 (1948); *Middle Atlantic Area Case*, 9 C. A. B. 131 (1948).

The year 1949 was the first year in which the earliest feeder certificates were scheduled to expire, and accordingly, in that year the Board entered upon the review phase of its program. It now had the facts and figures which were lacking in 1944. In the ensuing years, the operating rights of a substantial number of feeders were renewed, some for an additional period of five years. In only one instance has the Board refused to renew a feeder certificate.[8]

Mergers of feeders have been approved, verifying that the experimental period is past.[9] Among others, the merger of two feeders operating in Washington, Oregon and Idaho is now before the Board for approval[10] and concurrently with its Order in this case the Board, on its own motion, instituted an investigation as to whether the public convenience and necessity would be served by the merger of Southwest Airways and Bonanza Air Lines.[11]

In retrospect, the Board's feederline program as it is being administered today bears little resemblance to the experiment launched in 1944. Feeders are not performing services which differ significantly from the services provided by trunklines. No new type aircraft peculiarly adapted to short haul transportation has been developed. Local ownership and local areas of coverage, once believed essential to the success of the venture, are no longer of interest to the Board. The ingenuity

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[8]*Florida Airways Certificate Extension*, 10 C. A. B. 93 (1949).

[9]*Monarch-Challenger Merger*, 11 C. A. B. 33 (1949) *Arizona-Monarch Merger*, 11 C. A. B. 246 (1949).

[10]West Coast-Empire Merger, Docket No. 5220.

[11]Order Serial No. E-6041, January 17, 1952.

and rigid economy, which in practice would enable the new feeder carriers to offset the competition with highly developed rail and highway transportation, have run their course.

The so-called experiment quickly passed reasonable bounds, metamorphosing completely into the planned development of a permanent secondary route system. In the language of Donald W. Nyrop, Chairman of the Civil Aeronautics Board:[12]

> ". . . the commercial air route pattern of the United States has evolved naturally into a two-level structure; that is, the structure on the one hand of the major trunkline air operation and on the other hand of the local air service serving small cities and towns on comparatively short-haul operations. As we progress further into the future with air travel becoming more and more necessary and usable, I believe that the judgment of the Civil Aeronautics Board in laying the foundation for this secondary short-haul air transportation will be more than justified. *The local schedule air carrier operation has come to stay.*"[13]

Not since 1949 in the single case of *Florida Airways, Certificate Extension,* 10 C. A. B. 93, has the Board shied against continued "experimentation" with public funds where the standards originally set down in 1944 and 1946 have not been met, and then only in a situation where the carrier was, as a practical matter, bankrupt. With

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[12]Address before Local Service Airline Seminar, Purdue University, June 20, 1951.

[13]Emphasis in quoted material added throughout unless otherwise noted.

the renewal of five feeder certificates,[14] and renewal of most of the remainder in process, it has now become obvious that any feeder which comes through the initial period of certification unscathed by bankruptcy can anticipate enduring existence, although on paper its authority may be limited to a period of years. Accordingly, after six years of operation, it is apparent that feeder airlines are a permanent fixture of our transportation system.

Today seventeen feederlines are in the field, with one trunkline, Mid-Continent Airline, operating a feeder route under a feeder-type certificate. Additionally, two carriers operate feeder service routes with rotary wing aircraft. The feedline industry employs 4,645 individuals and operates 31,939 certificated feeder route miles, with 26 single-engine and 134 twin-engine aircraft, at an original property and equipment cost of $7,913,000. For the year ended September 30, 1951 they carried a total of 1,371,000 passengers, flew 269,380,000 revenue-passenger miles and 818,000 mail-ton miles and realized aggregate operating revenues of $33,956,000, of which $18,636,000 or 54.88% were received from the United States Government in the form of mail pay at the average rate of $22.78 per mail-ton mile (compared to an average rate of 69c per mail-ton mile for the trunklines) or $1.22 for every dollar received from the commercial sale of transportation.

Still the line of demarcation between a feeder and a trunkline has not been drawn. Western, as its route structure shows, engages in feeder type service on several segments of its system. Indeed, every trunkline, the transcontinentals included, conducts some feeder type service.

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[14]Trans-Texas to March 31, 1954; Pioneer to September 30, 1954; Southwest to September 30, 1954; Frontier to March 31, 1955; Wisconsin Central to September 30, 1955.

4. History of Western's Service in the Imperial Valley.

Effective August 22, 1938, Western was certificated, under the "grandfather clause" of the Civil Areonautics Act, Section 401(e)(1), to engage in the transportation by air of persons, property and mail over a route, among others, to be known as Route 13, extending from San Diego, California, to Salt Lake City, Utah, via the intermediate points, Long Beach and Los Angeles, California, and Las Vegas, Nevada.[15]

Western's pioneering efforts in the Imperial Valley and its attempts to link that area with Phoenix, Arizona, as well as with the coastal areas of Southern California, began on April 22, 1940, when Western filed an application with the Board for authority to operate a new air route between San Diego and Phoenix via El Centro, California, and Yuma, Arizona. After consolidation for hearing with one case and subsequent severence and consolidation with a companion case, that application was heard and Western's certificate for Route 13 was amended to include El Centro, among other points.[16]

In 1944, Western again petitioned the Board for authority to operate east of El Centro to Yuma and Phoenix, among other stations, with the result that Yuma was added as a certificated point on Route 13.[17] In succeeding years, Western continued to press for a route pattern embracing Phoenix, the Imperial Valley and Los Angeles-San Diego. A 1946 application for extension from Yuma

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[15]*Western Air Express Corporation—Certificates of Public Convenience and Necessity,* 1 C. A. A. 39 (1939).

[16]*Transcontinental & W. A., et al., North-South California,* 4 C. A. B. 254, 274 (1943); *American Air, et al., East-West California,* 4 C. A. B. 297, 321 (1943).

[17]*Rocky Mountain States Air Service,* 6 C. A. B. 695, 741 (1946).

to Phoenix was denied.[18] In the case here under consideration Western once again requested the same authority it had applied for a decade back.

Air service to the Imperial Valley was inaugurated by Western in January, 1946, after notification from the Board[19] that the national defense no longer required a delay in the implementation of the amendment granted in 1943.

The evolution of the type of service pattern flown today by Western in the Imperial Valley was marked by a period of experimentation. Inaugural service consisted of a turn-around flight between Los Angeles and San Diego via Palm Springs and El Centro. After several months, that type of schedule proved to be unsatisfactory, and the flight plan was altered after due notice to the Board to provide for a morning turn-around schedule between Los Angeles and El Centro via Palm Springs and an afternoon turn-around schedule between Los Angeles and El Centro via San Diego. With the discontinuance a few months later of service over the segment between Palm Springs and El Centro, the pattern of Western's operation in the Imperial Valley took the shape which, after inauguration of service to Yuma following certification of that point in 1946, has been maintained consistently to this date. Thus, for all intents and purposes, Yuma became the southern-most terminal for Route 13, as if that route had been extended beyond San Diego to El Centro and Yuma the same as Western's original Route 63 between Los Angeles and San Francisco was extended beyond San Francisco to Portland and Seattle.

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[18] *Arizona-New Mexico Case*, 9 C. A. B. 85, 102 (1948).

[19] Order, Serial No. 4027, September 13, 1945.

Financially Western has experienced some lean years in serving the Imperial Valley. The serious retrogression in the air transportation industry after World War II impelled much curtailment of service and reorganization, the effects of which only now are being completely removed. Western weathered the turbulence, which at times threatened to engulf it, and today is proud of its record of having reached within the span of a few years a self-sufficient status without need for subsidy mail pay.

It is understandable, therefore, that in the years immediately following World War II Western did some experimenting with its operations in the Imperial Valley, even to the extent of at one time conditionally contracting for the transfer of the San Diego-Yuma segment of Route 13 to Arizona Airways, which had been certificated to fly between Yuma and Phoenix.

Western's investment of time, money and effort in providing service to El Centro and Yuma on the Imperial Valley segment of its permanent certificate for Route 13 has borne fruit in the past year and a half. Both El Centro and Yuma are profitable stations on Western's system, as indicated by reports filed by Western with the Board and part of the stipulated record in this case. Those cities are important economically to Western's total operation.

QUESTIONS INVOLVED.

1. Does the order of the Board, in so far as it eliminates Western from El Centro and Yuma, amount to a revocation in part of Western's certificate in violation of Section 401(h) of the Act which permits revocation, in whole or in part, only if the holder be in default and fail to comply within a reasonable time with an order commanding obedience?

2. Assuming the elimination of Western from El Centro and Yuma to be a temporary suspension only, does the Board have the legal power under Section 401(h) of the Act to suspend a permanent certificate, in whole or in part, in order to make room for a new carrier?

3. Does the elimination of a permanently certificated carrier from a route segment or from intermediate points, whether by temporary suspension or by permanent revocation, without just compensation violate the Fifth Amendment of the United States Constitution?

SPECIFICATION OF ERRORS.

The errors which Western relies upon and urges in support of its position on this review are:

1. The Board erred in eliminating Western from El Centro and Yuma under circumstances and in a manner which amount to a revocation in part of Western's permanent certificates for Route No. 13 without complying with the revocation provisions of Section 401(h) of the Act.

2. The Board erred in eliminating Western from El Centro and Yuma, though the elimination be only a tem-

porary suspension in part of Western's permanent certificate for Route 13, because Section 401(h) of the Act does not permit the suspension in whole or in part of a permanent certificate in order to make room for a new carrier.

3. The Board erred in depriving Western of property rights without just compensation contrary to the provisions of the Fifth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT.

1. The Order of the Board Amounts to a Revocation in Part of Western's Certificate Contrary to the Provisions of Section 401(h) of the Act.

The circumstances and the proclamations of the Board make it manifest that the Board's Order eliminating Western from El Centro and Yuma amounts to a revocation in part of its permanent certificate for Route 13. Absent a default by Western, which did not exist here, and a failure to comply within a reasonable time with an order of compliance, the Board lacked the legal power to revoke the certificate, either in whole or in part.

To assume that the elimination of Western from El Centro and Yuma will continue only until December 31, 1952, the theoretical termination date of Bonanza's certificate, would be to ignore realities and attribute to the Board an act which would be unwise, profligate and contrary to the spirit and the objectives of the Act.

The Board has stated that Bonanza could not operate successfully between Phoenix and Los Angeles via the

designated intermediate points unless Western be eliminated from El Centro and Yuma. It would not be sensible to argue that the Board intended to allow Bonanza to incur the cost which would be required to start and maintain an operation between Phoenix and Los Angeles, only to order that operation discontinued on December 31, 1952, and Western's operations at El Centro and Yuma resumed. Thus, the elimination of Western from these points is tantamount to a revocation in part of its certificate. The revocation was not accomplished in compliance with Section 401(h) of the Act.

2. The Suspension Provisions of Section 401(h) of the Act Do Not Permit the Elimination of a Permanently Certificated Air Carrier to Make Room for a New Air Carrier.

The purpose of the Civil Aeronautics Act was and is to develop and lend stability to the air transportation industry. To say that Section 401(h) of the Act permits the Board to remodel the national air route structure by eliminating a permanently certificated carrier from points or segments of its system for the benefit of a new or another carrier would be to say that impermanence and instability are congenial to the spirit of the Act.

It is not fitting that an air carrier, which has provided adequate service, should have its permanent rights suspended solely to enable another carrier or a new carrier to perform the same service at a point or in an area where the traffic is insufficient to support two carriers on an economical basis.

3. Elimination of Western From El Centro and Yuma, Either by Suspension or Revocation, Without Just Compensation for Its Lost Property Rights Is in Violation of the Fifth Amendment of the Constitution.

The fact that Western's certificate for Route 13 does not "confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area or air navigation facility,"[20] does not mean that the elimination of Western from El Centro and Yuma is exempt from the provisions of the Fifth Amendment of the Constitution.

The loss that Western will suffer in anticipated profits, in the cost of shutting down the operation, in abandoning, moving or selling ground facilities at El Centro and Yuma involves property rights. Without just compensation, and none is provided for in the Order, the elimination of Western from El Centro and Yuma constitutes a violation of the Fifth Amendment.

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[20]Section 401(j) of the Act.

ARGUMENT.

1. The Order of the Board Amounts to a Revocation in Part of Western's Certificate Contrary to the Provisions of Section 401(h) of the Act.

(a) Statute Involved.

The power of the Board to eliminate Western from the Imperial Valley segment of its Route 13, if it had the power, must come from Section 401(h) of the Act, which reads in full:

> "The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, or modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, *or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

The Board contends that its act was only suspension, not revocation. Hence, the Board does not suggest that the procedure required to be followed under 401(h) before

a certificate can be revoked in whole or in part was, in fact, followed in this case.

If it can be shown that the act of the Board in ordering Western out of El Centro and Yuma under the prevailing circumstances amounts to revocation, the Board's Order must be reversed on that point alone.

(b) The Factual Background Discloses That the Order of the Board Can Be Construed Only as a Revocation in Part if Meaning Is to Be Assigned to the Second Part of 401(h).

In its Order the Board chose with the utmost care words that would seem to stamp the elimination of Western from El Centro and Yuma as a temporary suspension only:

> "We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, *i. e.,* on December 31, 1952, when Bonanza's certificate formally expires." (Appendix A, p. 19.)

But these words are hollow in the face of related facts and other acts of the Board and in the face of less guarded words used by the Board elsewhere in the Order.

As for the less guarded words, the Board said this in the Order:

> "Based on the foregoing considerations and all the facts of record, we find that the public convenience and necessity require the provision of a local air service between the co-terminal points, Los Angeles and Long Beach, California, and the terminal point, Phoenix, Arizona. . . ." (Appendix A, p. 9.)

* * * * * * * *

"Thus, after full consideration of the record in this proceeding in the light of the well-established Board policies with respect to the selection of carriers to operate local air service routes, and with relation to the Board's responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, we have selected Bonanza as the carrier to be authorized to provide the required local air service." (Appendix A, p. 16.)

* * * * * * * *

"These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, *in the long run,* be better served by a local service carrier than by a trunk." (Appendix A, p. 17.)

These words do not support the bald declaration that the elimination of Western is temporary. To the contrary, they connote clearly and precisely that the "suspension" is permanent. A permanent suspension is a revocation, no matter how it may be seasoned or colored.

The acts of the Board unmasking the suspension are many. Perhaps the act which reveals with the most telling conviction that the elimination of Western's Imperial Valley segment is permanent and not temporary is the order of the Board instituting an investigation concerning the integration of the routes of Southwest Airways Company and Bonanza. This order, which was issued on January 17, 1952, the same day that the Order here challenged was issued, and bears Serial Number E-6041, the next succeeding number, reads in full:

"Orders
Serial Number E-6041

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 17th day of January, 1952.

In the matter of the integration of the routes of:

SOUTHWEST AIRWAYS COMPANY
and
BONANZA AIR LINES, INC.

Docket No. 5254

ORDER INTITUTING INVESTIGATION.

It appears to the Board on the basis of preliminary study that an investigation should be instituted to determine if a combination of Southwest Airways Company (Southwest) and Bonanza Air Lines, Inc. (Bonanza) by means of merger, consolidation, acquisition of control, or route transfer, or in any other lawful manner, would be in the public interest and in accordance with the public convenience and necessity.

The Board, acting pursuant to the Civil Aeronautics Act of 1938, as amended, and particularly Sections 205(a), 415, and 1002(b) thereof, and finding that its action herein will assist it in performing its duties and exercising its powers under the Act;

IT IS ORDERED:

(1) That investigation be and it hereby is instituted to determine whether the integration of the routes of Southwest and Bonzana into a single *unified*

> system by means of merger, consolidation, acquisition of control, route transfer or in any other lawful manner would be in the public interest and in accordance with the public convenience and necessity as defined in Section 2 of said Civil Aeronautics Act."

As pictured by the map forming the frontispiece of this brief, Bonanza's Route No. 105 runs from Reno, Nevada, to Phoenix, Arizona. Southwest's Route No. 76 runs from Medford, Oregon, to Los Angeles, California. The gap between the two systems, Los Angeles to Phoenix, which will be closed only if the Order here be affirmed, is almost as wide, 450 miles, as Bonanza's present route is long, 660 miles.

Bonanza's certificate is scheduled to expire on December 31, 1952, *unless* in the meantime an application for an extension be filed, which automatically would extend the effectiveness of the certificate under Section 9(b) of the Administrative Procedure Act until the Board had acted upon the petition, and *unless* the certificate be extended by the Board on its own initiative or under petition from Bonanza.

The sketchy history of the feeder airlines set out in this brief is sufficient to affirm that Bonanza's certificate is not going to come to an end on December 31, 1952. If this historical cloak were not acceptable proof the Board's quoted order of investigation would be quite sufficient.

It is doubtful, indeed improbable, that the investigation relating to the integration of the two feeder systems will be completed by December 31, 1952. But should the investigation be expedited, completion could hardly be

more than a few weeks ahead of that date. Surely the Board would not subject Southwest and Bonanza to the expense of going through a full-scale hearing of that nature and importance if it had seriously in mind any thought of not renewing Bonanza's certificate. Likewise, the Board would have to be charged with improvidence and indifference had it initiated the investigatory proceeding without first entertaining a strong view that integration of the two routes would be sensible. If integrated, Bonanza's system, plus the new route between Phoenix and Los Angeles, necessarily would have to be extended to September 30, 1954, which marks the theoretical end of Southwest's new term.[21]

Thus, Bonanza's system is almost certain to be alive until September 30, 1954. On that date Southwest (presumably as enlarged to extend down to San Diego, across to Phoenix. and U'd back up to Reno) would have been in operation almost eight years since its inauguration on December 6, 1946. That system will not come to an end on September 30, 1954, or at any other date, and the Los Angeles-Phoenix segment is not going to be chopped out in order that the "temporary suspension" of Western's Imperial Valley segment can be restored.

The narration of the origin and development of feeder service invalidates the claim that the Board has any serious intention of ever restoring Western's San Diego-El Centro-Yuma segment should its Order here be affirmed. Of the 22 franchised feeders, only one, Florida Airways, has been cancelled out by the Board's refusal to extend the certificate. The operation of Florida Airways was

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[21] *Southwest Renewal-United Suspension Case,* Order No. E-6063, January 29, 1952.

hopelessly and helplessly inept and of such negative value to the public that there was no conceivable justification for attempting to inject any more artificial life into it. The collapse of Florida affords no basis for arguing that the feeders are only temporary.

In a dissenting opinion in the Trans-Texas Certificate Renewal Case, Docket No. 3720, Board member Jones noted that the feeder system is "becoming so firmly imbedded in our transportation network" that "there is no blinking the fact that . . . extension (of feeders) for a term of years, regardless of how it is hedged about with language calling it an 'experiment,' amounts to a permanent authorization."

The simple fact is that the feeders are here to stay. If Western's Imperial Valley segment be "suspended" in favor of Bonanza, never again will Western serve that segment. This is revocation, not suspension.

(c) Applicable Legal Principles.

Section 401(h) has not before been subjected to court interpretation. Hence, the approach can be fresh, neither aided nor hampered by precedent.

Isolated from the remainder of the Act, Section 401(h) is not as clear as it might be. But when read with other pertinent sections and with the Act as a whole the ambiguities dissolve and the real meaning and intention of the Section comes in clear range.

The Section involves two separate powers concerning certificates—suspension and revocation. An important difference exists between the two powers and it is essential that this difference be recognized and affirmed before the section can be applied validly, with respect either to suspension or to revocation.

(i) Suspension and Revocation Powers Differ.

The Board and Bonanza may contend in effect that the power of suspension and the power of revocation are coexistent, coextensive and completely overlapping with the exception that suspension, either in whole or in part, must be supported by public convenience and necessity, whereas revocation, either in whole or in part, may be invoked only for an uncured default by the carrier. Thus, so the argument might go, with the power of suspension the Board may do to a certificate whatever it choses under the cloak of public convenience and necessity, including the equivalent of revocation, either in whole or in part. Running hand in hand with this power, the argument may continue, is the power to revoke a certificate in whole or in part, even though the service may be required by the public convenience and necessity, if the carrier be in default and fail to cure the default on reasonable notice. This reasoning would torture the Section and ignore the essence of the Act as a whole.

The argument is downed by the simple admission, which must be conceded, that the public convenience and necessity would require the suspension of service by a defaulting carrier. Thus there would be no need to have a separate revocation provision if, in fact, the two powers were coexistent and coextensive, excepting only that the one is dependent on the public convenience and necessity and the other on an uncured default.

Whatever ambiguities may be detected in the Section at first blush, it is hardly to be said that Congress did not intend to place a high fence around the Board's revocation power and that a significant distinction between suspension and revocation was intended. One difference is

that suspension is temporary, with full reversionary rights upon removal of the ground for suspension, while revocation is permanent and wholly devoid of reversionary rights.

To affirm the distinction between suspension and revocation in Section 401(h), it is only necessary to turn to Section 402(g) concerning foreign air carriers, which reads:

> "Any permit issued under the provisions of this Section may, after notice and hearing, be altered, modified, amended, *suspended,* cancelled or *revoked* by the Authority whenever it finds such action to be in the public interest."

With *foreign flag* carriers, beneficiaries of the Board's certificate-issuing power under Section 402(a), a certificate may be suspended *or* revoked if dictated by the public interest. Revocation of the rights of a foreign flag carrier is not limited to an uncured default.

To suspend, according to Webster, means "to debar *temporarily* from any privilege . . .; to cause to cease *for a time* . . .; to stop *temporarily* . . .; to make *temporarily* inoperative."

To revoke, according to the same authority, is "to annul by recalling or taking back; to repeal; rescind."

The one is temporary, the other is permanent.

Thus it is that Congress knowingly and wisely cloaked *American flag* domestic operations with stability and permanency, except for an uncured default.

To argue, as the Board and Bonanza may, that the right of suspension and the right of revocation are coequal and coexistent, differing only in the justification for action, public convenience and necessity or uncured de-

fault, is to flaunt the legal principle that use of different language in a statute indicates an intended different result. The principle is stated concisely in American Jurisprudence:

> "The use by the legislature of certain language in one instance and wholly different language in the other, indicates that different results were intended, and the courts have even so presumed. Under this rule, where language is used in one section of a statute different from that used in other sections of the same chapter, it is to be presumed that the language is used with a different intent. Accordingly, the presence of a provision in one section of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted." (50 Am. Jur. 261, 274.)

The facts and the surrounding circumstances point only to the permanent ejection of Western from its Imperial Valley operation on the El Centro-Yuma segment of its Route 13. This means that Western's Route 13 has been revoked in part contrary to the procedure set up by Section 401(h).

2. The Suspension Provisions of Section 401(h) of the Act Do Not Permit the Elimination of a Permanently Certificated Air Carrier to Make Room for a New Air Carrier.

(a) Stability Is the Essence of the Civil Aeronautics Act.

Even though it could be assumed that the removal of Western from El Centro and Yuma was intended to be and will be temporary only, and thus a suspension rather than a revocation, the suspension part of Section 401(h) does not give the Board the power to do what it attempted to do here.

One of the major purposes of the Civil Aeronautics Act was to lend stability to the then (and still) growing air transportation industry.

Concerning H. R. 9738, this statement appears in 83 Congressional Record at page 5960:

> ". . . if this legislation is enacted, the air carriers will be able to operate on a *stable* basis, their routes *secured* by a certificate of convenience and necessity which may be *revoked only for cause* . . ."

At page 6406 of the same record, Congressman Lea, floor manager of the bill, is quoted in this manner:

> "However, in the absence of legislation such as we have now before us, the lines are going to find it very difficult, if not impossible, to finance their operations because of the lack of *stability and assurance in their operations.* You would not want to invest $200.00 or $2,000.00 a mile in a line that has no *assurance of security of its route* and no protection against cutthroat competition.
>
> "Part of the proposal here is that the regulatory body created by the bill will have the authority to issue certificates of convenience and necessity to the operators. *This will give assurance of security of route.*"

On page 8500 Congressman Lea is quoted again:

> "In my judgment, . . . *two things are the fundamental and essential needs of aviation at this time, security and stability in the route* and protection against cutthroat competition. . . . We want to give financial stability to these companies so they can finance their operations and finance them to advantage."

The insistent and predominating need of stability and some semblance of permanency in the industry was recognized by the Federal Aviation Commission implemented by President Roosevelt prior to the Civil Aeronautics Act to investigate the then infant and confused air transportation industry and recommend appropriate legislation. In the report of that Commission, dated January 30, 1935, which appears as Senate Document No. 15 of the 74th Congress, First Session, in Volume IV, commencing at page 9898, this lucid and prescient statement is found:

> ". . . *The air transport map cannot be redrawn every few years without utterly disastrous effect on the service. New lines ought to be created on a substantially permanent basis. An air line cannot be casually torn up and transplanted.* The fixed investment in land, buildings, and equipment, of a major airline ranges, according to the best information that we can secure, from $200 to $500 per mile of route. While there are lines that have not a penny of such investment, and that depend entirely on rental of existing structures and services, they do not seem to us to offer an ideal example of the type of service that ought to be developed in the future."

The report of this Commission played a major part in the enactment of the Civil Aeronautics Act of 1938.

Similar recognition of the importance of stability and permanency was engraved in the report of the Air Policy Commission created by President Truman to assist him in formulating an integrated national aviation policy. This report, dated January 1, 1948, almost ten years after the Civil Aeronautics Act came into being and when the industry was less juvenile though perhaps still somewhat confused, appears in a volume titled "Survival in

the Air Age," printed by the United States Government Printing Office. The point under discussion was given consideration in this language commencing on page 110:

> "*Domestic route pattern.*—The problem whether there is too much or too little competition in our domestic, air-transport system involves not only the question of new entries into the field and competitive extensions of the routes of existing companies, but also the important question whether combination of existing companies should be encouraged or prevented by the Board.
>
> "We recommend that the Civil Aeronautics Board defer for a short time decisions in new route certification cases. This should not be confused with a freezing of the present route pattern, which would certainly be undesirable. There is, however, a widespread confusion as to the principles which guide the Civil Aeronautics Board in its route determinations. A body which is under the constant pressure of daily decisions of case after case cannot accomplish the careful planning which the development of a national route pattern demands. The present air transportation system has not developed as expected before and during the war. There is need for a comprehensive survey of the present situation and the development of a more cohesive philosophy. The resulting clarification of policy should bring about acceleration of subsequent route decisions.
>
> "As a part of such review, if the Board should find *any routes no longer now required by public convenience and necessity,* it should use any present legal powers such as suspension or reduction of 'need' payments to reduce the effect of any errors in the present system. *This appears preferable to causing instability in the industry through granting to the Board the right of outright revocation of routes.*"

Here the Commission recognized the propriety of the right of temporary suspension when the public *no longer requires* the service, if, perhaps, an army base should be decommissioned or nearby mines exhausted, examples later noted in this brief. At the same time the Commission recognized the instability that would follow the power of effecting outright revocations.

It is of no small significance that the report of President Roosevelt's Federal Aviation Commission was written before Section 401(h) was placed on the books, whereas the report of President Truman's Air Policy Commission was written after that Section had been on the books close to ten years. Still, both Commissions heeded the importance of stability. Moreover, the last Commission did not find in Section 401(h) the great and grave powers the Board now seeks to read into it.

That the Board members are not always indifferent to the problem is indicated by this quotation from an article by Member Ryan:

> ". . . *In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation,* it is not surprising that Congress should impart to a certificate *a certain stability by providing that it should be subject to revocation only for statutory cause and not pursuant to a mere change of mind on the part of the Board.*"[22]

The Act itself sets up a guide that is clear and compelling. Section 2 reads in full:

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[22]Ryan, The Revocation of an Airline Certificate of Public Convenience and Necessity, 15 J. of Air Law and Commerce, 377, 385 (1948).

"Declaration of Policy.

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics."

(b) Public Convenience and Necessity Require Stability in the Air Transportation Industry.

Implementation of the suspension power granted by 401(h) must be based on public convenience and necessity. Section 2 requires the Board to consider as being in accordance with the public convenience and necessity the regulation of air transportation in such manner as to foster *sound economic conditions* and to improve the relations between air carriers as well as to promote adequate, economical and efficient service by air carriers at reasonable charges.

If, under the guise of suspension (or revocation), the Board could reshuffle or remake the domestic air route pattern, one step of which is evidenced here, all semblance of stability and permanence would vanish. This would not foster sound economic conditions in air transportation. Nor would adequate, economical and efficient service by air carriers at reasonable charges be promoted if each individual carrier were faced with the ever present threat of having its route structure slashed or patched by suspensions to match the current whim of the Board.

If, with the sword of suspension, the Board can hack a point or segment out of a carrier's permanent certificate to make room for a new or different carrier, the power of the Board to remake the entire domestic air route pattern is complete.

The public interest in stability of utility franchises is noted by Ford P. Hall, Professor of Government, Indiana University, in the Third Edition of his textbook captioned "Government and Business" at page 182:

> "Franchises may be classified as follows: perpetual franchises, long-term franchises, short-term franchises, and indeterminate permits. Perpetual fran-

chises, although not common, have sometimes been granted. The short-term franchises running for five or ten years have often been employed. The uncertainty of renewal has made them highly unsatisfactory from the point of view of the utility. As a result, the public might suffer because of the unwillingness of the utility to extend service because of uncertainty as to its future status. In general, the long-term franchise has been more satisfactory."

In the same authoritative textbook, at page 142, Professor Hall remarked:

> "After all, it is the convenience and necessity of the whole public and not a small group which must be considered. Furthermore, not only the convenience and necessity of the moment but also that over a long period of time must be considered."

Here the public convenience and necessity, the whole public, will be delivered a shattering turn if impermanence and instability are admitted to the air transportation industry simply to provide a slightly different air service to a relatively small area of the country by a new carrier at the cost of ousting the old carrier. That instability will infect United, TWA, and all of the other great American flag trunklines, big and small.

Western's operation from San Diego to El Centro to Yuma and back is exactly the same as Western's operation from San Francisco to Portland to Seattle and back, except for length and traffic density. El Centro and Yuma, as the Board fully recognizes, are served as an extension of Route 13 out of San Diego. Portland and Seattle are served as an extension of Route 63 out of San Francisco. One involves 151 miles and a total population of 21,735. The other involves 681 miles, with a

population of 841,219. But here the difference vanishes. The principle remains identical. So it is if the Board under the pretense of suspension can eliminate Western from El Centro and Yuma it can eliminate Western from Portland and Seattle just as quickly and in precisely the same fashion.

Should 401(h) be construed by this Court as the Board seeks to have it construed, the Board's power over the American flag domestic air transportation industry would be boundless and could be despotic. Had Congress willed to grant this awesome power, the intention would not have been buried in the cloudy language of 401(h).

(c) Other Sections Confirm the Limitations of 401(h).

In addition to Section 2 of the Act, which is clear enough, Sections 401(d)(2) and 401(e)(1), both of which are set forth in Appendix B of this brief, affirm that the suspension power under 401(h) was not designed to be used as the Board is now seeking to use it.

Section 401(d)(2) provides for the issuance of temporary certificates "for such limited periods as may be required by the public convenience and necessity." There would be no need for temporary certificates if the Board, in fact, had the power it professes to have under the suspension portion of 401(h).

Section 401(e)(1), commonly called the "grandfather clause," required the issuance of certificates to carriers which were in operation at the time the Act became effective. The grant of certificates under the grandfather clause was not dependent upon public convenience and necessity. Unquestionably it was recognized by Congress, as in other common carrier and public utility inactments,

that fair treatment and stability were of major importance. Even though some bad routes, or malformed routes, were inherited permanently under the grandfather clause, and this occurred, fairness and stability rightly prevailed.

The grandfather clause of the Act would have been stripped of meaning if the day after a grandfather certificate had been issued to the Board had only to flip over to 401(h) and revoke it through the suspension loophole.

(d) The Limited Suspension Powers Under 401(h) Are Important.

It is not argued by Western that the suspension part of 401(h) is meaningless or, when properly construed, valueless to the Board's important functions as guided by the declaration of policy in Section 2. It is entirely right that the Board should have reasonable suspension power. It would be wrong if the Board stood unarmed when a once-needed air service became useless. But this weapon rightly should be sheathed against a use that could be unfair and that could corrode stability.

If a once sizeable and prosperous community, then needing and supporting air service, become impoverished and depopulated because of the exhaustion of nearby mines (as has happened) or because of the decommissioning of a major army base (as has happened), the Board should have the right upon petition, complaint, or its own initiative, after notice and hearing, to suspend the service. It would not be right to require the carrier to apply for abandonment under 401(k), since the mines might be revived or the base recommissioned, as abandonment would be permanent with no reversionary rights. It would not be right to compel the Board to await a de-

fault by the carrier which would give rise to a permanent revocation.

That, clearly, is an example of the proper interpretation and application of the suspension power under 401(h). And the propriety of this application of the Section would not be affected by the existence of a condition—the exhaustion of mines or the decommissioning of an army base—requiring an indefinite suspension which by the passage of time might prove to be permanent. The suspended carrier still would not be forfeiting involuntarily a right in favor of a newcomer. The carrier still would know that if the mines were ever revived or the base remanned its operations would be resumed. And the Board would not be vested with the power to remake the air route map from time to time to suit its own fancy.

Other examples of a proper and sensible application of the suspension powers under 401(h) could be given. The dust-bowl catastrophe of some years back brings to mind that wholesale emigration from an area because of a drought might require, in the public convenience and necessity, suspension of air service at one or more points. An improbable and hideous thought, but war with a neighbor might call for suspension of service at border and near-border stations. And an amended treaty could require the suspension of Western's service to Edmonton, Canada, or Amerian Air Lines' service to Mexico City. But in all of these cases the suspended carrier would get its rights back once the convenient and necessary condition warranting the suspension had dissolved.

Use of the suspension power to provide for discontinuance for the time being of an air service which becomes unneeded or impossible of performance, without

forcing the carrier to seek permanent abandonment or to invite permanent revocation by a willful default, is entirely fair and fosters stability and sound economic conditions in the industry. Use of the suspension power, as the Board here seeks to use it, to revise the route pattern and to take out an existing carrier which has done an adequate job and is not in default to make room for a newcomer is not compatible with fairness, stability and the other principles laid down in Section 2 of the Act.

3. Elimination of Western From El Centro and Yuma, Either by Suspension or Revocation, Without Just Compensation for Lost Property Rights Is in Violation of the Fifth Amendment of the Constitution.

Inasmuch as each of the first two arguments appears to be conclusive, but little space need be devoted to the proposition that the manner in which the Board has attempted to dispossess Western from the Imperial Valley segment of its Route 13 is in violation of the Fifth Amendment of the United States Constitution. The point is presented largely that it may not be deemed waived.

It is to be expected that the Board will counter this reasoning by citing 401(j) of the Act, which reads:

> "Certain Rights Not Conferred by Certificate. (j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility."

This Section does not nullify the argument, nor does it give the Board the power to take or dispose of property of a carrier without just compensation. Western is not claiming that the Imperial Valley segment of its Route 13

gives it a proprietary or property right in the use "of any air space, civil airway, landing area, or air navigation facility." It is not the loss of this which forms the base of Western's claim.

Were the Board's Order to stand, Western will lose the investment it has made, largely in the form of early-stage operation losses totaling around $100,000.00, in developing the Imperial Valley air traffic to its present point of profit. Western will lose the future profits from the segment which, but for the revocation in part of Route 13, should be sustaining and substantial. It is to be anticipated that Western will suffer a loss on its ground equipment at El Centro and Yuma, either in consequence of non-user, because of a forced sale or because of cost of transferring the equipment to other system points.

For the base of this argument it is unnecessary to attempt to reduce to dollars the loss which would be sustained by Western. The fact is that the amount involved is significant and the loss relates to property rights, exclusive of the rights in the certificate, which would be taken from Western by the Board's Order.

It is unthinkable that either the framers of the Constitution or Congress intended that a pioneering air carrier should spend money, time and effort in developing and promoting traffic in a virgin area only to have the results taken away from it and handed over gratis to a newcomer for harvesting.

These judicial statements frame the point with validity:

> "Though property of a carrier be dedicated to a public use, it remains private property of the owner and may not be taken without just compensation. The carriers have not ceased to be privately operated

and privately owned however much subject to regulation in the interests of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees." (p. 357.)

* * * * * * * *

"All agree that the pertinent provisions of the Constitution in issue are Article I, Section 8, Clause 3, which confers the power on Congress to regulate commerce among the several states, and that this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment." (p. 347.)

Railroad Retirement Board v. Alton Railway, 295 U. S. 330, 79 L. Ed. 1468 (1934).

* * * * * * * *

"Congress may not, under the commerce clause or otherwise, take property of one without compensation and transfer it to another even for a valid public purpose." (p. 550.)

United States v. Rock Royal Cooperative, 26 Fed. Supp. 534 (D. C., N. D., New York, 1939).

* * * * * * * *

"The Fifth Amendment by implication forbids the taking, even under the authority of Congress, of the private property of one person and giving of it to another. Also it is to be noted that the state cannot take private property of one for the use of another, even when regulating an industry touched with public interest or for public welfare." (p. 308.)

Hudson Duncan Company v. Wallace, 21 Fed. Supp. 295 (D. C., Oregon, 1937).

The Board's cuffing of the Fifth Amendment is neither answered nor excused by the fact, should it be a fact, that in due time Western might derive some compensation for the taking through a more generous mail rate.

In appraising this point note should be taken that if the Board have the power to deprive Western of its property rights at El Centro and Yuma, comparably small, the same uncompensated deprivation can be accomplished at Seattle and Portland where the amount involved would be a major figure.

Conclusion.

Justification for the great power arrogated by the Board under 401(h) must not be founded on the fact that in the national scheme of things El Centro and Yuma appear relatively unimportant. Nor may justification be found in the assertion that the Board will never abuse or misuse the power. If the Board can cut off the El Centro-Yuma segment of Western's Route 13 at San Diego and give it to Bonanza it can cut off the Portland-Seattle segment of Western's Route 63 at San Francisco and give it to Southwest. That the Board might never dare go so far is no warrant for allowing the first wedge to be entered. Should the Board's Order here be affirmed, a harassing precedent would be established which would require affirmance of an Order truncating Western's Portland-Seattle segment back to San Francisco under comparable circumstances.

Section 401(h) should be interpreted by this Court in a manner that will eliminate the destructive consequences of the instability in the air transportation industry which would follow the right of the Board to recast the domestic air route pattern without the consent of the affected carriers and solely in response to the Board's fluid interpretation at the moment of what might suit the public convenience and necessity.

Los Angeles, California, March 7, 1952.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,
By HUGH W. DARLING,
Attorneys for Western Air Lines, Inc.

Certificate of Service.

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused this brief to be served upon the attorneys for Civil Aeronautics Board, Bonanza Air Lines, Inc., and Southwest Airways Company by mailing three copies to each, properly addressed with postage prepaid.

Los Angeles, California, March 7, 1952.

FRANK DE MARCO JR.

APPENDIX "A."

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Served: Jan. 17, 1952.

Docket No. 2019 *et al.*

Reopened Additional California-Nevada Service Case.

Decided: January 17, 1952.

Certificate of public convenience and necessity of Bonanza Air Lines, Inc., for route No. 105 amended to authorize service, with certain limitations, between the coterminal points Los Angeles and Long Beach, Calif., and Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif.

Certificate of public convenience and necessity of Western Air Lines, Inc., for route No. 13 temporarily suspended, insofar as it authorizes service to El Centro, Calif., and Yuma, Ariz.

Certificate of public convenience and necessity of Frontier Airlines, Inc., for route No. 93 temporarily suspended, insofar as it authorizes service on segment 1 between Yuma and Phoenix via Ajo, Ariz.

Western's authority to serve San Bernardino and Palm Springs, Calif., not suspended.

Except, as otherwise above indicated, application for additional local air service in California and Arizona denied.

Appearances:

E. W. Jennes, Paul D. Lagomareini, and Howard C. Westwood for American Airlines, Inc.

Alexander C. Dick, G. Robert Henry, and Frank W. Beer for Bonanza Airlines, Inc.

Harry A. Bowen and Emil N. Levin for Frontier Airlines, Inc.

Martin J. Burke and W. Clifton Stone for Los Angeles Airways, Inc.

Walter Roche, C. Edward Leasure and H. F. Scheurer, Jr., for Southwest Airways Company.

James K. Crimins and Henry P. Bevans for Trans World Airlines, Inc.

Floyd M. Rett, John T. Lorch and James Francis Reilly for United Air Lines, Inc.

D. P. Renda and Donald K. Hall for Western Air Lines, Inc.

James A. Murphy for the State of Arizona Corporation Commission and Greater Arizona, Inc.

Robert H. Berlin and Chester K. Hendricks for the city of Banning, Calif.

Edward A. Hass for the Beaumont Chamber of Commerce.

Wayne H. Fisher and W. M. Blasz for the city of Blythe.

Seraphim B. Perreault for the Brawley Chamber of Commerce.

Perry Perreault for the city of Brawley, Calif.

W. G. Duflock for the city of El Centro and the El Centro Chamber of Commerce.

Alexander W. Staples for the city of Indio.

Russell W. Rink for the city of Palm Springs.

Roy D. Boles for the city of Ontario.

Eugene Best for the city of Riverside.

T. T. Hannah for the county of Riverside.

A. W. Walker for the county of San Bernardino.

Harold G. Lord for the city of San Bernardino.

George Kerrigan for the city of San Diego.

John B. Wisely, Jr. and Harold C. Giss for the city and county of Yuma.

Julian T. Cromelin and Frank J. Delany for the Post Office Department.

Ronald H. Cohen and Ernest Nash, Public Counsel.

Dean E. Howell for the County of San Diego.

John T. Kimball for the Phoenix Chamber of Commerce.

Nicholas Udall for the city of Phoenix.

John B. Lydick for the County of Imperial.

John H. L. Bate for the Harbor Commission—Port of San Diego.

Opinion.

By the Board:

In this proceeding, we are once again presented with the question of the local air service needs of the Los Angeles-San Diego-Phoenix area.[1]

A public hearing was held before Examiner F. Merritt Ruhlen, and his report was served on the parties on August 17, 1951. The Report recommended, *inter alia*, that local air service be provided between San Diego and Phoenix via El Centro, Yuma, and Ajo, and that Western Air Lines, Inc. (Western), rather than either of the local service applicants, Southwest Airways Co. (Southwest), or Bananza Air Lines, Inc. (Bonanza), be selected to render the service. The Examiner found that local service between Los Angeles and San Diego via Santa Ana-Laguna Beach and Oceanside, and between Los Angeles and Phoenix via San Bernardino, Palm Springs, or to any of the other cities for which application for such service was made is *not* required. The Examiner also recommended the suspension of Frontier Airlines, Inc.'s (Frontier), authority to serve Yuma-Ajo-Phoenix, and Western's authority to operate flights between San Bernardino or Palm Springs on the one hand, and El Centro-Yuma on the other.

Exceptions to the Examiner's Report were filed by Southwest, Bonanza, Frontier, United Air Lines, Inc. (United), and Western, and except for United which called attention to its brief before the Examiner, each of the foregoing parties filed briefs in support of their exceptions. The aforementioned parties and certain civic

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[1]See Appendix, pp. 22-26, for a statement of our previous consideration of this matter.

intervenors also appeared in oral argument before the Board.

Attached hereto as an Appendix are portions of the Examiner's Report containing the findings, conclusions, and recommendations with which we agree, and adopt as our own. We shall discuss herein principally those matters on which we have reached a conclusion different from that recommended in the Report, and those contentions of the parties which warrant further expression of our views.

Los Angeles, Santa Ana-Laguna Beach, Oceanside, San Diego Service.

In a supplemental decision in the original California-Nevada Service Case, we found a need for local air service to Santa Ana-Laguna Beach, Oceanside, and San Diego as part of a Los Angeles-Phoenix route as well as a need for local air service to El Centro, Yuma, and Ajo.[2] We have carefully considered the record in this, the reopened proceeding, and find no basis therein for changing our original conclusion as to the need for a local Los Angeles-San Diego service as part of a Los Angeles-Phoenix local service route.

As we previously noted, because the area around Los Angeles is heavily built up and traffic congestion is increasing, travel by automobile from Santa Ana or Laguna Beach to the Los Angeles and Long Beach municipal airports is comparatively slow. Air service to these two communities would make convenient transportation available to the north and east through trunkline connections at either Los Angeles or San Diego. As for Oceanside,

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[2]Additional California-Nevada Service Case, Los Angeles-San Deigo-Phoenix, 11 C. A. B. 39, 40-45.

it is not within convenient driving distance of either Santa Ana or San Diego, and its economic strength, plus its location near the Pendleton marine base, indicate that it would benefit from local air service.

Moreover, if the local service route between Phoenix and San Diego is not extended to Los Angeles, a considerable amount of the local traffic will be inconvenienced. There is no question that for the cities east of San Diego, such as El Centro, Yuma, Ajo, and Blythe,[3] Los Angeles is the western point of greatest traffic attraction. Terminating the San Diego-Phoenix local service route short of Los Angeles would inhibit the full development of the local service traffic potential since the relative time and service advantage of air transportation over surface transportation for the relatively short distances here involved would be watered down by the necessity of using a connecting service.

If, as we have found, Los Angeles is the appropriate terminal for the local service route east of San Diego to be certificated herein, the additional certification of local service stops between San Diego and Los Angeles appears to be in the public interest since the added cost of this local service experiment between these points would consist primarily of the added station expenses.[4] Moreover, the addition of two intermediate points between San Diego and Los Angeles is desirable to discourage the carrier from competing for terminal-to-terminal traffic between Los Angeles and San Diego. We concur in the Examiner's conclusion that additional Los Angeles-

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[3]See pages 8-9, *infra*.

[4]Some additional flight costs are also involved since it is relatively more expensive to land or take off an aircraft at a point than to overfly it, but these costs are not substantial.

San Diego terminal-to-terminal service does not appear required by the public convenience and necessity. We recognize that some terminal-to-terminal traffic will fly on the local service carrier's aircraft. However, we feel that the amount of diversion from the nonstop services currently certificated between these points that will result from a local air service in smaller, slower aircraft should not be substantial.

We have considered also the effect of our decision on Los Angeles Airways authority to operate a local service route with rotary-wing aircraft in the Los Angeles area which would, of course, be duplicated in part by the Santa Ana-Laguna Beach-Los Angeles segment here found to be required by the public convenience and necessity. However, the date on which Los Angeles Airways will inaugurate passenger service between these points is still in the indefinite future, and the extent of public acceptance of transportation by rotary-wing aircraft is stitll unknown. In any case, we believe that the amount of diversion of Los Angeles' traffic would be negligible.

With respect to Oceanside, the principal contention adverse to its certification is that the only suitable airport, that at the Pendleton marine base, is not available for civilian use. While the record is inconclusive as to the availability of this airport, we note that other military airports in the same section of the country are being used by civil air carriers, and it is reasonable to expect that similar arrangements could be made in this case, especially where the inauguration of such service would be a substantial convenience to the military personnel stationed there.

Local Air Service to Blythe, Calif.

The Examiner's Report recommended against the inauguration of a local service experiment to the city of Blythe, Calif., although recognizing that the community is a relatively isolated one. However, the Report did not consider the possible inclusion of the point on the San Diego-Phoenix local service segment but only on a Los Angeles-Phoenix route via Palm Springs and San Bernardino, a segment which was not found to be required by the public convenience and necessity, a conclusion with which we do not quarrel.

On the other hand, we have considered the possible inclusion of Blythe on the local service route between San Diego and Phoenix, and have determined that the inauguration of air service to Blythe on that route is required by the public convenience and necessity.

Blythe is located 238 miles southeast of Los Angeles, 156 miles northwest of Phoenix and about 65 miles northwest of Yuma. Its 1950 population was 4,086 representing a 73.5% increase over its 1940 population. In the immediate surrounding territory there are an additional 6,000 people, making a total of about 10,000 persons living in this community. It is primarily an agricultural community in an area of considerable agricultural wealth. In addition, it has some manufacturing including one of the largest gypsum plants in the United States.

Blythe's primary communities of interest are with Los Angeles and Phoenix. In a representative 30-day period in 1950, it is estimated that over 7,000 persons from Los Angeles were registered in Blythe hotels, and over 1,000 from Phoenix. A secondary community of interest is similarly indicated with San Diego and Yuma.

There is no passenger rail service available at Blythe. Bus transportation, which is available, takes 4 hours to Phoenix and about 6 to 7 hours to Los Angeles. Among other testimony as to relative inconvenience of current mail service, there is evidence in the record that mail deposited in the morning at Blythe frequently is not delivered in Los Angeles until 48 hours later.

Blythe could be served by air between Yuma and Phoenix as an alternate intermediate point to Ajo, in which case the additional costs of inaugurating a local air service experiment to the point would consist pricipally of the added station costs, and flight costs for an additional 35 miles between Yuma and Phoenix for the added circuity of such route over a flight between such points via Ajo.

Based upon the foregoing considerations and all the facts of record, we find that the public convenience and necessity require the provision of a local air service between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif., with Blythe and Ajo being served on alternate flights.

Selection of Carrier.

As previously noted, the Board in its original decision herein awarded the above route (with the exception of Blythe) to Southwest[5] (11 C. A. B. 39). However, prior to the date upon which the award would have become effective, the Board, after consideration of petitions for rehearing, reargument, and reconsideration filed by

[5]The choice of carrier was between Western, a trunk carrier, and Southwest, a local service carrier, since Bonanza was not then a party to the proceeding.

several parties to the proceeding, alleging, *inter alia,* that the Board's award to Southwest was, in part, outside the issues in the proceeding and could not be supported by the record therein, vacated such award.[6] The order set Southwest's application down for further hearing, permitted such application to be amended to place squarely in issue a Los Angeles-Phoenix local air service via San Diego, and consolidated into the reopened proceeding those parts of its previous decision as related to suspending portions of Western's and Arizona's (Frontier's predecessor) routes conflicting with a possible Los Angeles-San Diego-Phoenix local service route.

Southwest argues that this order was legally deficient insofar as it purported to rescind the route awarded to Southwest. It is the carrier's position that, under the provisions of section 401(g) of the Act,[7] a certificate once issued to a carrier may not be rescinded even *prior* to the date upon which it is to become effective except upon compliance with the requirements of section 401(h) of the Act; to-wit, after notice and hearing, and upon a showing of wilful failure to comply with a requirement of the Act, an applicable regulation, or a certificate condition, which after having been called to the carrier's attention was not corrected. We must reject this contention. Southwest was clearly on notice that the original award was subject to reconsideration and we are satis-

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[6]In Docket No. 2899, which was consolidated into this proceeding, Southwest had applied for a route extension from Los Angeles to San Diego, and from Los Angeles to Phoenix via various intermediate points. Southwest, however, had not specifically applied for a Los Angeles-Phoenix route via San Diego.

[7]As noted by the carrier, section 401(g) provides in part that "each certificate shall be effective from the date specified therein and shall continue in effect until suspended or revoked as hereinafter provided."

fied that the Board's action in reopening the proceeding was proper.[8] Our attention has not been directed to any contrary authority. We, therefore, do not feel inhibited in selecting a carrier by our previous decision to award a substantially similar route to Southwest.

Before proceeding further with our opinion as to the carrier to be designated, there is one additional point to be made. The Examiner noted, and we agree, that the selection of a carrier to render the local air service between San Diego and Phoenix necessarily involves the question of suspension of Western's authority at El Centro and Yuma, and Frontier's authority over its Yuma-Ajo-Phoenix segment since there is insufficient traffic potential at any of these points to justify service by more than a single carrier. Western seeks to inhibit our ability to select a carrier other than itself by challenging our authority to compel a certificated carrier to suspend service to a point for reasons other than misuser or default. We have on other occasions met similar challenges to our authority with a full expression of our

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[8]The certificate "issued" to Southwest which was attached to the Board's order (Serial No. E-3727, dated December 19, 1949) stated on its face: "This certificate, as amended, shall be effective on February 17, 1950: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of December 19, 1949 (Serial No. E-3727), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time." (See 11 C. A. B. 39, 50-51.) The effective date of this certificate was extended to March 31, 1950 by Orders Serial Nos. E-3869 and E-3935, dated Feb. 2, 1950 and Feb. 24, 1950, respectively. Since the opinion in the Kansas City-Memphis-Florida Case, Supplemental Opinion, 9 C. A. B. 401 (1948), such a clause has been specifically inserted in each certificate to take care of situations such as this where the Board might reconsider and rescind the authorization granted in the original opinion. See 9 C. A. B. 401, 408.

views as to our power to so act.[9] We are not here presented with any new arguments which warrant further discussion.

As between choosing Western or one of the two local service carrier applicants, a decision is not difficult to reach. The considerations involved in our well-established policy favoring the award of local service routes to local service operators rather than trunk operators are squarely applicable here.[10] And on previous occasions we have applied this policy where Western was an applicant for a local service route,[11] and we are not here presented with any substantial change of circumstances or any new reasons justifying a different conclusion. Moreover, the history of Western's service to El Centro and Yuma[12] is such as to warrant an adverse conclusion as to Western's willingness to operate a truly local service route.

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[9]North Central Route Investigation, Docket No. 4603 *et al.*, Order Serial No. E-5952, adopted December 13, 1951; Wisconsin Central Renewal Case, Docket No. 4387 *et al.*, Order Serial No. E-5951, adopted December 13, 1951; Frontier Renewal Case, Docket No. 4340 *et al.*, Order Serial No. E-5702, adopted September 14, 1951; All American Airways, Inc., Suspension Case, 10 C. A. B. 24, 27-28; Caribbean Area Case, 9 C. A. B. 534, 545, 554.

[10]See, for example, Rocky Mountain States Air Service, 6 C. A. B. 695, 730-32 (1946); West Coast Case, 6 C. A. B. 961, 981 (1946); New England Case, 7 C. A. B. 27, 39 (1946); Texas-Oklahoma Case, 7 C. A. B. 481, 502 (1946). The award of local service route No. 106 to Mid-Continent Airlines, Inc., occurred under exceptional circumstances and was not intended to be a departure from our basic policy. See Parks Investigation Case, Order Serial No. E-4472, dated July 28, 1950, p. 22; also North Central Route Investigation Case, Order Serial No. E-5952, dated December 13, 1951, pp. 4-5.

[11]Rocky Mountain States Case, *supra*, p. 733; Additional California-Nevada Service Case, Supplemental Opinion, 11 C. A. B. 39, 41-42.

[12]See Appendix, pp. 56-59.

Even though Western could operate the local air service we find required by the public convenience and necessity, at a lower cost to the government, we may not permit that fact to be decisive. For if relative cost were the dominant criterion for the award of a new local air service, it would put an end to our policy of favoring independent local service carriers to operate local service routes.

Similarly, the conclusion that Western can offer more through service to the communities on the local service route than either of the other applicants does not especially buttress its case since it would be the rare instance where a trunk with its greater route mileage and number of communities served would not offer a through service to more traffic than would a feeder applicant for the same route. Thus, if this factor were to be considered decisive, the trunk applicant would ordinarily succeed to a local service route rather than the local service carrier applicant most qualified to render the local air service.

For these reasons, we conclude that one of the local service carrier applicants for the route should be preferred to Western.[13] A more difficult choice is presented with respect to selecting one of the latter applicants. No one has seriously contested Southwest's or Bonanza's fitness, willingness, and ability to conduct the required local air service, and we find they both meet the required statutory standard for the award of a route extension.

We have carefully considered the record in this proceeding in the light of the contentions of these applicants as to their relative ability to generate traffic and serve a

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[13]See pages 16-18 for additional discussion of our reasons for suspending Western's service at El Centro and Yuma.

local air service route and can find little in this regard to choose between them. Both have done a creditable job in exploiting the local service routes for which they have been certificated, and they appear equally capable of doing a similar job for the new Los Angeles-Phoenix route.

Moreover, we do not believe that the record demonstrates that this route can be more readily fitted into the route systems of either carrier for while the western end of the route is contiguous to the trade area now served by Southwest, the eastern end is contiguous to that served by Bonanza, and the cities in the center, that is, El Centro, Yuma, Blythe, and Ajo whose needs are our primary concern in this proceeding, can hardly be said to fall within the natural service orbit of either one. Nor do we believe that the selection of either carrier would impair the possibilities of integration of the carriers' routes since no matter which carrier is selected their routes would become contiguous.[14]

Southwest, in arguing for its selection rather than Bonanza, relies principally on the fact that it can operate the new service more economically. This position is supported by cost estimates submitted by Public Counsel. The estimated difference in cost of operation is 3.23 cents per plane mile in Southwest's favor.

On the other hand, Bonanza urges that it has a greater need than Southwest for additional route mileage and that this proceeding affords the most logical opportunity for strengthening its route pattern. Bonanza is one of the smallest local service carriers, having a route system of

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[14]See Southwest-West Coast Merger Case, Order Serial No. E-5594, adopted August 7, 1951, p. 4.

only 639 operable miles and serving only eight communities. On the other hand, while not numbered among the largest local service carriers, Southwest is twice the size of Bonanza and serves more than four times the number of communities; the area it serves is one of comparatively high population density and wealth.[15] With these advantages Southwest has progressed considerably further on the road to economic self-sufficiency than has Bonanza.

Bonanza is now severely hampered by a lack of sufficient traffic and revenue volume over which to spread its overhead costs, and it cannot obtain maximum utilization of its aircraft. In the year ending June 30, 1951, for example, its scheduled daily aircraft utilization was only 4:24 hours, compared with an average of 6:07 hours achieved by other local service operators using DC-3 equipment, and its total operating expense reached 103.70 cents per revenue mile as opposed to an industry average of 89.86 cents. There is no contention before us that the differences indicated by these figures are due to management deficiencies or other factors within the carrier's control, and familiar as we are with the influence of size on relative efficiency and cost, we accept the carrier's contention that the award of additional route miles to its system with the traffic and revenue potential available thereon would tend to lower its system unit operating costs and thus, to improve its economic position.

To the extent that Bonanza's system unit operating costs for its present route are reduced as a result of the route extension here awarded the carrier, the Govern-

[15]These factors may also result in an advantage to Southwest in the comparative amount of off-line revenues which it might obtain if awarded the new segment rather than Bonanza. The amount of such revenues is not conclusively indicated by the record, but does not appear to be substantial.

ment will realize a saving in mail pay support for its current route. And, while due primarily to lower operating costs, Southwest would probably be able to operate the Los Angeles-Phoenix route with a lesser sum for mail pay support than will be required therefor by Bonanza, this advantage of Southwest's will tend to be offset by the mail pay support savings on Bonanza's present route.

Thus, after full consideration of the record in this proceeding in the light of the well-established Board policies with respect to the selection of carriers to operate local air service routes,[16] and with relation to the Board's responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, we have selected Bonanza as the carrier to be authorized to provide the required local air service.

Our conclusion that the public convenience and necessity require the route awarded Bonanza, as previously indicated, requires suspension of Western's service at El Centro and Yuma, and suspension of Frontier's authority to serve the Yuma-Ajo-Phoenix segment which has not been activated. In reaching our conclusion as to the carrier to be selected, we considered carefully the effect on the aforementioned communities of the new routing on which they would be placed, and of the change in carrier which would be rendering the service. We think the advantages to Ajo of having a direct one-carrier service to Los Angeles and Phoenix are obvious, and are more than sufficient to offset any other advantage over Bonanza that Frontier might claim on the record before us. The advantages to Yuma and El Centro of being placed on the new routing and of being given service by

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[16]See footnote 10, *supra*.

Bonanza are less tangible. Yuma will be benefited by being placed upon the route system of a single carrier rather than two. The traffic potential of Yuma is not sufficient for two carriers, and it is doubtful, therefore, whether it would be given the same quality of service by two carriers as it would by one. And both El Centro and Yuma should receive improved service through being served by a local service rather than a trunk carrier. For Bonanza these points represent important traffic centers whose development warrant its best efforts whereas to Western the record indicates they were and are secondary points to which adequate service will be rendered only where some other purpose of the carrier is being served. In this connection, it bears noting that service to these points was only increased from a three times weekly frequency to twice daily after Western was placed on notice that the Board might suspend its authorization to serve the points, and thus adversely affect Western's plan for extension of its route to Phoenix.

The low priority which Western has undoubtedly given to the air transportation needs of these cities does not stem from any inherent hostility to these communities on the part of the carrier but from the fundamental economic fact that a business will ordinarily first seek to exploit the areas of greatest potential profit, leaving the others to some later period of greater relative prosperity. For similar reasons, in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, in the long run, be better served by a local service carrier than by a trunk.

It should be further noted that service to Los Angeles, the city with which Yuma and El Centro have their greatest community of interest, over the new routing by Bonanza will be no less convenient than that currently offered by Western. For example, Western operates only one through flight a day in each direction between Los Angeles on the one hand and El Centro and Yuma on the other, the other flight requires a change of plane at San Diego.[17] Bonanza's proposed schedules provide an equally convenient and no less expeditious trip for eastbound or westbound passengers, and all flights are through flights which do not require a change of plane. Moreover, since Bonanza will not have to schedule its equipment with a view to its availability for longer more profitable hauls, it will have sufficient flexibility to permit the scheduling of service which will permit passengers from communities east of San Diego such as Yuma and El Centro to travel to San Diego and Los Angeles, transact their business and return home the same day. It is this type of scheduling which we have pointed out provides the most desirable service for communities on local air service routes.[18]

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[17]According to the Official Traffic Guide for January 1952, Western has two scheduled departures from Los Angeles to San Diego, El Centro and Yuma. The first, a DC-3 flight, leaves Los Angeles at 7:20 a.m. PST and arrives at Yuma at 10:50 a.m. MST, the second a Convair flight as far as San Diego leaves Los Angeles at 1:25 p.m. PST, arrives at San Diego 2:10 leaves San Diego as a DC-3 flight 10 minutes later arriving at Yuma at 4:45 p.m. MST. The earliest flight to Los Angeles leaves Yuma as a DC-3 flight at 11:10 a.m. MST, changes to Convair equipment at San Diego and arrives at Los Angeles at 12:40 p.m. PST.; the later flight leaves Yuma at 7:25 p.m. MST and arrives at Los Angeles at 8:55 p.m. PST.

[18]Western's schedules (see footnote 17, *supra*) permit a Los Angeles resident to travel to Yuma and El Centro, transact business and return the same day but do not permit the El Centro and Yuma passenger the same convenience.

We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, *i. e.,* on December 31, 1952, when Bonanza's certificate formally expires. However, it is possible that Bonanza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act[19] and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. Accordingly, Western's authority to serve El Centro and Yuma will be suspended up to and including December 31, 1952, or until final determination by the Board of a timely application by Bonanza for renewal of Segment No. 2 of its route No. 105, whichever shall last occur.

We have also considered the question of necessary restrictions on Bonanza's authority to operate the new route segment to prevent the carrier, insofar as practicable, from offering additional through service between Los Angeles-Long Beach on the one hand, and San Diego and Phoenix on the other, or between San Diego and Phoenix. At present, Bonanza has the usual local service restriction in its certificate which requires it to render service to each point between point of origin and point of

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[19]Section 9(b) of the Administrative Procedure Act provides, in part, as follows: "* * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

termination of each flight. It will, therefore, be sufficient for this purpose if we require that trips scheduled between Los Angeles-Long Beach on the one hand and San Diego on the other shall be scheduled to originate or terminate at Phoenix.[20]

Conclusion.

On the basis of the foregoing considerations and all the facts of record, we find that the public convenience and necessity require:

1. The amendment of Bonanza's certificate for route No. 105 to include a new segment extending between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., and Yuma and Ajo, Ariz., and Blythe, Calif.

2. That each trip scheduled by Bonanza between the coterminal points Los Angeles and Long Beach and the intermediate point San Diego shall originate or terminate at Phoenix, Ariz.

3. That Bonanza shall not serve Ajo, Ariz., and Blythe, Calif., on the same flight.

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[20]In Order Serial No. E-3597, dated November 22, 1949, the Board permitted Bonanza to overfly points on its then existing route. That order is so drawn as to apply only to the route between the terminals Reno, Nev., and Phoenix, Ariz., and would not apply to the new route segment herein awarded to Bonanza.

4. Suspension of Western's certificate for route No. 13 with respect to El Centro, Calif., and Yuma, Ariz., until December 31, 1952, or until the date on which the Board shall have finally determined a timely filed application by Bonanza for renewal of Segment No. 2 of route No. 105, whichever shall last occur.[21]

5. Suspension of Frontier's certificate for route No. 93 with respect to service over segment "1" between the terminal points Yuma and Phoenix, Airz., via Ajo, Ariz.

We also find that Bonanza is a citizen of the United States within the meaning of the Act, and is fit, willing, and able properly to perform the air transportation authorized herein and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

In addition, we find that the public convenience and necessity do not require suspension of Western's certificate for route No. 13 insofar as service to San Bernardino and Palm Springs are concerned.

We also find that the applications in this proceeding should be denied in all other respects.

An appropriate order will be entered.

Nyrop, Chairman, Ryan, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

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[21]We will allow the carrier thirty days after the effective date of its amended certificate to wind up its business at El Centro and Yuma.

Appendix.

Excerpts from the Report of Examiner F. Merritt Ruhlen, Served August 17, 1951, in the Reopened Additional California-Nevada Service Case, Docket No. 2019, *et al.*

This proceeding was instituted to permit a re-examination of the local air service needs of the Los Angeles-San Diego-Phoenix area and a determination of the route pattern best adapted to meet those needs. In order that the Board would have the widest latitude in establishing a local route pattern, it ordered Western and Frontier to show cause why their authorizations to serve the smaller communities in this area should not be suspended[1a] proposals for local service.

Southwest proposes a route between Los Angeles and Phoenix via Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, and Ajo. It also proposes a route between Los Angeles and Phoenix via Ontario-Pomona, Riverside-San Bernardino, Banning-Beaumont, Palm Springs, Indio, and Blythe with a segment between Indio and El Centro connecting its two proposed Los Angeles-Phoenix routes. Bonanza's route proposals are similar to those of Southwest except that it does not contemplate service to Indio, Banning-Beaumont, or Ontario-Pomona. Western seeks an extension of its present San Diego-Yuma segment to Phoenix. Each of the applicants indicated its willingness to accept certificates and consolidated such suspension proceedings with the for any local service required in the Los Angeles-Phoenix area.

[1a]The suspension issues involve Western's authorizations to serve San Bernardino, Palm Springs, El Centro, and Yuma and Frontier's authorization of a Yuma-Ajo-Phoenix segment.

Pursuant to notice a public hearing was held in Washington, D. C. and Los Angeles, California. Briefs have been submitted by all of the applicants, Public Counsel, and the intervenor, American Airlines; the intervenors Los Angeles Airways and TWA submitted letters stating their position.

The problem of establishing air service in this area adequate to meet both long haul and local service needs has been the subject of Board proceedings for a number of years. To facilitate an understanding of the problems involved herein it is worthwhile to consider the historical background of the local service problem in this area.

In 1940 Western applied for a route between Los Angeles-San Diego and Phoenix. The Los Angeles-Palm Springs-El Centro portion of that application[2] was consolidated into the North-South California Case, 4 C. A. B. 254 (1943) and the San Diego-El Centro-Yuma Phoenix proposal[3] in to the East-West California Case, 4 C. A. B. 297 (1943). In addition, Western's request for authority to serve San Bernardino as an intermediate point on its route No. 13[4] was also consolidated into the North-South California Case, *supra*. These two proceedings were decided on May 10, 1943, and Western was certificated to serve San Bernardino, Palm Springs and El Centro as intermediate points on its Los Angeles-San Diego route No. 13, but its proposal for service to Yuma and Phoenix was denied. In 1942 Western applied for a route from El Centro to Douglas via Yuma.

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[2]Docket No. 414.
[3]Docket No. 563.
[4]Docket No. 532.

Phoenix, Tucson, and Nogales.[5] This application was considered in the Rocky Mountain Case, 6 C. A. B. 695 (1946). In that decision the Board authorized the inclusion of Yuma as an intermediate point on route No. 13 between El Centro and Palm Springs, but denied Western's application for an extension to Phoenix and beyond.

In the West Coast Case, 6 C. A. B. 961 (1946) Southwest, Western, and other applicants proposed additional service in the area south and southeast of Los Angeles.[6] All these applications were denied. In February 1946, Western filed another application proposing service from Yuma to Phoenix and points beyond.[7] This application was included in the Arizona-New Mexico Case, 9 C. A. B. 85 (1948), which embraced other proposals for service in the area between Phoenix and San Diego. Western's application was again denied and Arizona Airways was authorized to operate local air service in Arizona, which included a route segment between Phoenix and Yuma via Ajo. In 1947 the Board in the Los Angeles Helicopter Case, 8 C. A. B. 92 (1947) authorized Los Angeles Airways to provide a helicopter mail and express service in the Los Angeles metropolitan area which included any point within a radius of 50 miles from the Post Office Terminal Annex Building, Los Angeles, California.

In the original Additional California-Nevada Service Case, 10 C. A. B. 405 (1949) Southwest proposed local

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[5]Docket No. 819.

[6]Southwest, Docket No. 722; Western, Docket No. 821; American, Docket No. 1395; Los Angeles Airways, Docket No. 1408; Ryan School of Aeronautics, Docket No. 1364; and TWA, Docket No. 1037.

[7]Docket No. 2224.

service in the Los Angeles-San Diego-Phoenix area. Before that case was decided Western entered into an agreement with Arizona Airways to transfer its San Diego-El Centro-Yuma segment to Arizona Airways, Docket No. 3440. In the Additional California-Nevada Service Case, *supra,* the Board deferred decision on Southwest's proposal for local service in this area pending consideration of the transfer of Western's San Diego-Yuma route to Arizona Airways. In the meantime Western filed an application, Docket No. 3768, requesting permission to suspend service on the San Diego-El Centro segment pending inauguration of service by Arizona Airways from Yuma to Phoenix; thereafter Western withdrew its application for permission to suspend service of the San Diego-Yuma segment and for the approval of the transfer of this segment to Arizona Airways, and in Docket No. 3976 applied for the extension of route No. 13 from Yuma to Phoenix. In addition Western filed an application, Docket No. 4007, for expeditious consideration of its Yuma-Phoenix application and for an exemption order authorizing Western to immediately inaugurate Yuma-Phoenix service. This application was denied by the Board by Orders Serial Nos. E-3727, Dec. 19, 1949 and E-3869, February 2, 1950.

In the meantime the Board in a Supplemental Opinion in the Additional California-Nevada Service Case on December 19, 1949 authorized the extension of Southwest from Los Angeles to Phoenix via Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, and Ajo; ordered Western to show cause why its service at San Bernardino, Palm Springs. El Centro, and Yuma should not be suspended; and ordered Arizona Airways which had been merged with Frontier Airlines to show cause why its Yuma-Phoenix segment should not be suspended.

In the Monarch-Arizona Merger Case, Docket No. 3977, decided April 10, 1950, the Board approved the merger of Arizona Airways and Frontier subject to the condition that service should not be inaugurated on the Yuma-Phoenix segment pending determination of the suspension proceeding referred to above. On March 10, 1950 and May 12, 1950 the Board by Orders Serial Nos. E-3975 and E-4156 rescinded Southwest's authorization for a Los Angeles-Phoenix route and consolidated its application with the Western and Frontier (Arizona Airways) suspension proceedings and the applications of Western and Bonanza for Los Angeles-San Diego-Phoenix routes.

An examination of the above facts discloses that the Board has had the Phoenix-San Diego-Los Angeles area under almost constant surveillance for the last ten years and has as yet been unable to find a satisfactory method for meeting the local air transportation needs of this area.

Los Angeles-San Diego.

Southwest and Bonanza propose local service to Santa Ana-Laguna Beach and Oceanside as intermediate points between Los Angeles and San Diego on their proposed Los Angeles-San Diego-Phoenix routes.[8]

Santa Ana-Laguna Beach: Santa Ana and Laguna Beach are located 19 miles south of the Long Beach Airport, and had a 1950 population of 51,722; this represented a 42.1 percent increase over 1940. These two cities

[8]At the hearing Bonanza confined itself to an attempt to prove the need for an extension from Phoenix to San Diego, and stated that it did not believe that additional service between San Diego and Los Angeles was justified. However, it stated that in event the Board found that such service was required it would be willing to provide it.

are located in the Los Angeles metropolitan area and have air mail service from Los Angeles Airways helicopter operation. The following table sets forth the number of rail and bus schedules daily between Santa Ana-Laguna Beach and Long Beach, Los Angeles, and San Diego.

Santa Ana	Frequencies		Average Time	
	Bus	Rail	Bus	Rail
Los Angeles	46	50	1:57	1:22
San Diego	6	10	2:30	2:09
Long Beach	14		:52	
Laguna Beach				
Los Angeles[1]	56		1:56	
San Diego	56		2:04	
Long Beach	56		.49	

[1]Laguna Beach receives rail service through Santa Ana.

The principal community of interest of these cities as indicated by hotel registration submitted by Southwest[9] is with Los Angeles where air service to all parts of the country is available. Santa Ana has a secondary community of interest with San Diego.

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[9]The hotel registration data submitted by Southwest in its exhibit SX 6 represented a 30-day period for each of the cities to which service herein is proposed. This exhibit was based on registration cards obtained from hotels and motels in each city for a period varying from 2 weeks to 1 month. The material thus obtained was expanded to cover all hotel rooms in each city for a 30-day period. Due to possibilities of error resulting from the limited periods and limited number of hotels covered, little reliance can be given to this data in determining the volume of traffic to be expected to flow to and from these cities. However, in spite of such defects these data would seem substantially more reliable in disclosing community of interest than would unsupported statements of witnesses. Consequently, in the absence of actual traffic data, these hotel registrations appear generally to be the best community of interest evidence available.

Oceanside: Oceanside, with a 1950 population of 12,880, is located approximately 60 miles from the Long Beach airport, and 40 miles from San Diego. Excellent highway facilities are available to both of these points, although traffic congestion tends to slow up travel by this means. Oceanside has 5 rail round trips daily with an average time of 2 hours to Los Angeles and 1 hour 6 minutes to San Diego. It has 69 bus schedules daily, which require an average of 2 hours 52 minutes to Los Angeles and 1 hour 4 minutes to San Diego, * * * Oceanside's principal community of interest as indicated by hotel registrations is with Los Angeles and only a minor community of interest is indicated with San Diego and points to the east of San Diego on the San Diego-Phoenix route.

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Los Angeles-San Diego Local Traffic: United, Western, and American now provide air service between San Diego and Los Angeles-Long Beach; United and Western are on an unrestricted basis. In January 1951 these 3 carriers using DC-3, DC-6, and Convair equipment operated 32 schedules with a total of 1,110 seats daily between Los Angeles and San Diego. and Western and United operated 12 schedules with 366 seats daily between Long Beach and San Diego. United's load factors between these points were 65.4 percent in May 1950 and 71.7 percent in October of the same year. During the year ended April 30, 1950 American operated from San Diego to Los Angeles with a local load factor of 14.7 percent; on flights from Los Angeles to San Diego the local load factor was 18 percent. During March and September, 1949, Western operated the San Diego-Los Angeles segment with an average load factor of less than 50 percent.

In addition to the certificated service, two intrastate air carriers, California Central and Pacific Southwest, each operate 4 round trips daily between San Diego and Los Angeles at reduced fares. During the year ended April 30, 1950 California Central experienced an average load factor of 31.1 percent over this segment. * * *

SAN DIEGO-PHOENIX.

All of the applicants herein propose local service between San Diego and Phoenix. Southwest and Bonanza propose service to the intermediate points El Centro, Yuma, and Ajo; and Western proposes the extension of its San Diego-El Centro-Yuma route segment to Phoenix. Frontier is authorized to operate the Yuma-Ajo-Phoenix segment but service has never been inaugurated, and, as mentioned previously, this authorization has been suspended pending decision here.[10]

El Centro: El Centro, with a population of 12,481, is located 89 miles from San Diego and 220 miles from Phoenix. It is a small trade area center for the fertile Imperial Valley which produces substantial quantities of agricultural products.

Since February 1950 Western has provided El Centro with two round trips daily. During the period February through September 1950 El Centro generated 3,448 passengers or an average of 431 monthly. On the basis of two round trips daily this was equivalent to 3.6 passengers per schedule. 1,669 or 48 percent of these passengers traveled to and from Los Angeles-Long Beach, 873 or 25 percent traveled to or from San Diego, and

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[10]Monarch-Arizona Merger Case, decided 4/10/50, Order Serial No. E-4050.

336 or 10 percent traveled to or from San Francisco. No other city generated 2 percent of the total El Centro traffic.

To the east the potential traffic flow is more difficult to estimate as no direct air service has been available. Hotel registrations at El Centro and at Brawley and Calexico, two other Imperial Valley cities, indicate that the principal community of interest of the Imperial Valley is with Los Angeles-Long Beach and San Diego, and that the community of interest with Phoenix is relatively minor. Out of a total of 17,225 registrants at El Centro, Brawley, and Calexico 7,143 were from Los Angeles-Long Beach, 2,134 from San Diego, and 606 from San Francisco, and only 269 from Phoenix. However, there were 2,136 registrants from points in the East who would receive a more direct service through Phoenix.

Although there is testimony of record that a substantial community of interest exists between El Centro and Phoenix due to Phoenix' status as a winter resort and the common ownership and operation of farms by Phoenix residents, the hotel registrations above mentioned indicate that such community of interest as does exist is relatively minor compared with El Centro's community of interest with San Diego and Los Angeles. El Centro has direct rail transportation to Phoenix, San Diego and Los Angeles but the traveling time due to the distance involved is substantially greater by rail than by air. Furthermore, the intense heat during the summer months, which makes the highways practically untravelable except at night, increases the need for air transportation.

El Centro's generation of traffic during the eight months in 1950 previously mentioned demonstrates that this city

will develop a substantial amount of air traffic which will be increased if an outlet to the east at Phoenix is authorized.

Yuma: Yuma, with a 1950 population of 9,095, is located 63 miles east of El Centro and 157 west of Phoenix. This city is also the center of a fertile agricultural area which is being rapidly extended by the expansion of irrigation facilities.

Western commenced serving Yuma on two round trips daily in February 1950. During the first eight months of this service Yuma generated a total of 1,471 passengers. Of these 715 or 49 percent were to or from Los Angeles-Long Beach, 497 or 34 percent were to or from San Diego, and 99 or 7 percent were to or from San Francisco. The above figures show that Yuma generated approximately 6 passengers per day with air service in only one direction.

Yuma's traffic potentiality to the east is difficult to determine due to the fact that no certificated air service has ever been provided in that direction. However, the fact that Yuma is located in Arizona and Phoenix is the State capital and principal trade center would tend to encourage travel between these cities. That these cities have a strong relationship is supported by hotel registration data of record. Out of a total of 15,477 registrants at Yuma, 3,706 were from Los Angeles-Long Beach, 2,047 from Phoenix, and 1,621 from San Diego. In addition 3,927 were from points east of Phoenix who would be benefited by connecting service at that city. On the basis of the above data it would appear that Yuma would generate a substantial amount of traffic to and from Phoenix and points east.

Although Yuma has direct rail service to Phoenix, San Diego and Los Angeles the distance involved results in a substantial amount of time required for travel to or from either of these points. Like El Centro the intense summer heat makes highway travel difficult. Western's experience during the eight months in 1950 above cited, Yuma's isolation, and the strong community of interest with Phoenix and points east indicate that a substantial amount of traffic would be generated if Yuma were served on a Phoenix-San Diego-Los Angeles route.

Ajo: Ajo is a mining city with a population of approximately 6,000, located 103 air miles from Yuma and 86 miles from Phoenix. The principal industry of this city is the operation of a copper mine by Phelps Dodge Corporation. This mine produces 475 tons of ore daily. Recently a new mill with a daily capacity of 2,500 tons has been constructed, and a new smelter for the ores mined locally has been installed. Formerly the ore from Ajo was transported to the smelter at Douglas.

Ajo is extremely isolated. It has no passenger rail service, the public transportation consisting of bus service to Phoenix over a second class road. The highways are indirect and during the summer the temperatures go as high as 130 degrees, making auto travel uncomfortable and inconvenient.

Inasmuch as Arizona Airways never inaugurated its certificated service it is difficult to estimate the air traffic potentiality of this city. Arizona Airways did operate one round trip a day as a noncertificated carrier in 1946, during which period it averaged one passenger daily. But due to a lapse of time and the type of service provided the volume of traffic actually carried in 1946 has

but very little probative value with reference to the traffic Ajo might produce if it were given two round trips a day on a certificated interstate carrier operating between Phoenix and San Diego.

Ajo's principal community of interest is indicated by hotel registrations submitted by Southwest. Out of a total of 666 registrants at Ajo, 286 were from Phoenix, 66 from Los Angeles-Long Beach, 22 from San Francisco, and 20 from San Diego. In addition 184 were from cities to the east of Phoenix. Testimony of a representative of the Arizona Corporation Commission also indicated that Ajo's principal community of interest is with Phoenix.

Southwest estimates that Ajo would generate approximately 400 passengers monthly. Because of its extreme isolation Ajo would no doubt produce a substantial amount of air traffic despite the limited potential indicated by the hotel registration data, but it may not be as strong a traffic producer as Southwest estimates. However, it would appear that it is stronger at the present time than when service to Ajo was certificated by the Board in 1948 and that service on a direct San Diego-Phoenix route would generate more traffic and could be provided at a lower unit cost than the Arizona Airways operation authorized which deadended at Yuma.

San Diego-Phoenix: American provides nonstop service between San Diego and Phoenix. During March 1951 that carrier operated 4 San Diego-Phoenix round trips daily providing morning and afternoon schedules in each direction. American submitted data for the year May 1, 1949 through April 30, 1950 showing the average local traffic load factor for representative months, weeks, days.

and hours. There were some isolated incidents when the local load factors exceeded 80 percent, but during this period there was an average of 26.5 seats per flight available for local passengers on eastbound flights and 32.2 westbound and local load factors averaged 23.4 and 26.2 percent, respectively. * * *

Conclusions:

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Air service to El Centro, Yuma and Ajo on a San Diego-Phoenix route would provide a substantial benefit to the traveling public. El Centro's primary needs for air service is to Los Angeles, San Diego, and San Francisco and it has a secondary need for air service to Phoenix and points east. Yuma's primary need for air service is to Los Angeles, San Diego and Phoenix. The primary need of Ajo is for direct air service to Phoenix and it has a secondary need for air service to San Diego and Los Angeles. The three applicants submitted traffic estimates over the proposed route and American contended that such estimates were excessive.

A summary of the applicant's passenger estimates on a monthly basis follows:

	El Centro	Yuma	Ajo	Total
Western[1]	663	998		1,661
Southwest[2]	992	474	414	1,880
Bonanza	960	1,080	240	3,280

[1]No service to Ajo proposed. Estimated traffic to San Bernardino and Palm Springs eliminated.

[2]Southwest in its revenue and expense estimates based on revenue miles to be flown and assumed load factor estimated a passenger potential approximately 50 percent of that indicated here.

Western's estimates of El Centro and Yuma traffic to the west were based on its actual operating experience during March and February 1950 expanded to a yearly basis using its actual 1949 seasonal variations index. Estimates of traffic from these cities to Phoenix were judgment figures. Southwest's estimates were based on a comparison of the proposed cities with cities on its existing system in the same population groups. Bonanza's estimates were based on a comparison with its actual operating results at Prescott and Kingman.

In addition to the traffic to be generated at the intermediate points Western forecase 198 monthly passengers between Phoenix and Los Angeles and 57 between Phoenix and San Diego. Southwest and Bonanza made no direct estimates of Phoenix passengers to and from San Diego and Los Angeles but Southwest did estimate San Diego would generate 906 monthly passengers. No attempt was made to indicate the direction these passengers would travel.

Southwest's and Western's estimates were based on operations between El Centro and Los Angeles via Palm Springs and San Bernardino as well as via San Diego. Consequently, the estimates should be modified to a minor extent for the service herein found needed.

American submitted no estimate of the total traffic which would be generated but contended that Western's and Southwest's estimates were excessive. With reference to Yuma-Phoenix, American stated 1,000 annual passengers were the maximum as contrasted with Western's estimate of 9,855.

Inasmuch as El Centro and Yuma have received convenient air service only since February 1950, no air service

from El Centro and Yuma to the east has been provided, and Ajo has never received certificated air service, any estimate of the potential traffic which will be generated over this segment is of necessity somewhat speculative. However, after a study of the estimates of the various parties, Western's experience during 1950, and community of interest date it is possible to come to some rather specific conclusions as to the potential traffic over this route segment.

During the 8-month period, February through September 1950, Western generated an average of 431 passengers per month at El Centro of which substantially all were destined or originated at points west of El Centro. Inasmuch as this was the first time since January 1947 that El Centro had received two round trips daily[11] it can be assumed that additional traffic will be generated if convenient schedules are maintained and more of the traveling public learns to rely on its frequency and reliability.[12] Consequently, El Centro should generate an average of approximately 600 passengers per month to and from San Diego, Los Angeles, and points to the west with two round trips daily. El Centro's Community of interest with Phoenix is not strong but a substantial traffic flow to points east of Phoenix is indicated by hotel registration data previously cited. An outlet to the east through Phoenix would be substantially more convenient for persons traveling between El Centro and points east of Phoenix than would a backhaul to San Diego or Los

[11]One round trip daily was provided during February and March 1947 and three round trips weekly from April 1947 through January 1950.

[12]During September 1946 the ninth month after El Centro service was inaugurated, El Centro generated 591 passengers on two round trips daily.

Angeles for connections with transcontinental carriers. Consequently, two round trips daily should generate an average of 150 passengers per month between El Centro and Phoenix and points to the east.

Yuma generated an average of 184 monthly passengers with service in only one direction during the above mentioned eight months in 1950. For reasons similar to those cited with reference to El Centro, Yuma traffic to the west should increase to at least 250 passengers monthly. In addition, Yuma has a community of interest with Phoenix and points to the east to which no satisfactory service is available comparable to that with San Diego, Los Angeles, and points to the west, and 250 passengers monthly should be generated between Yuma and Phoenix and points east.

Ajo, extremely isolated with no air service and poor bus and highway transportation, has its strongest community of interest with Phoenix. This city should generate an average of 200 passengers per month to Phoenix and 100 passengers per month to points to the west such as San Diego, Los Angeles, and San Francisco.

American compared the Yuma-Phoenix local traffic with the San Diego-Phoenix local traffic, which it estimated at 6,150 annually,[13] and concluded that an exceedingly liberal estimate of the Yuma-Phoenix local traffic would be 1,000 passengers yearly in both directions. American, however, ignored the air traffic from San Diego to points east of Phoenix. An examination of the Board's September 1948 and March 1949 survey figures discloses that the traffic from San Diego to points east

[13]The record does not disclose how this figure was determined but it approximates the September 1948 and March 1949 survey figures multiplied by 6.

of Phoenex, south of Missouri or east of the Mississippi which generated 10 or more passengers in either of the survey months was more than 4½ times as great as the local San Diego-Phoenix passengers estimated by American. On the same basis there would be 4,500 passengers from Yuma to points east of Phoenix who would benefit in a savings of both time and money if a route to Phoenix was established, making a total of 5,500 annually who would use this service. This would be equivalent to 458 monthly passengers traveling between Yuma and Phoenix as compared with the above estimate of 250 monthly passengers. The Yuma-Chicago trip via Phoenix would be more than an hour faster and would cost $20 less than the Yuma-Chicago trip via San Diego. The savings in time and fares would be even greater to many points south of Chicago. Accordingly, it is concluded that practically none of the traffic between Yuma and points east of Phoenix would use the San Diego or Los Angeles gateways.

American also compares the traffic generating ability of Yuma with that of Douglas-Bixby to determine the Yuma-Phoenix traffic potential and points out that there was an average of 67 monthly Phoenix-Douglas local passengers during the two survey months above mentioned.[14] However, American provided Douglas with only one round trip daily with arrivals and departures during the midday. With schedules as inconvenient as this American after several years serving Douglas in both directions generated an average of 221 passengers monthly in September 1948 and March 1949 as compared with Yuma's average of 184 monthly passengers in only one

[14]American discounts the survey figures 10 percent for refunds.

direction during the first 9 months it received more than three round-trip schedules weekly.

Southwest's hotel registration data disclose 5,954 hotel registrations at Yuma from Phoenix and points east as compared with 8,487 registrations from San Diego, Los Angeles, points to the west, and Los Angeles-Gateway cities.[15] Consequently, it is concluded that the volume of air traffic which Yuma would generate to the east would be comparable with that which it will generate to the west and that the traffic carried between Yuma and Phoenix and points beyond would be at least 3,000 per year as above estimated rather than the 1,000 estimated by American.

Although no additional service is needed for the local San Diego-Phoenix and Los Angeles passengers there is no doubt that some passengers would use a local service carrier if no trunkline service were available at the time the transportation was desired. This traffic should amount to 120 passengers per month both ways.

On the basis of the above estimates 36 passengers per day would be generated over the San Diego-El Centro segment, 21 passengers per day over the El Centro-Yuma segment, 21 passengers per day over the Yuma-Ajo segment, and 24 passengers per day over the Ajo-Phoenix segment. This would be equivalent to load factors of 43 percent, 25 percent, 25 percent, 29 percent, respectively, over the above mentioned segment on two round trips daily with 21 passenger equipment. This volume of traffic would generate 3,204 revenue passenger miles per day over the 89 mile San Diego-El Centro segment.

[15]Los Angeles gateway cities include an undetermined amount of passengers from some eastern points who would receive more convenient Yuma service through Phoenix.

1,323 over the 63 mile El Centro-Yuma segment, 2,163 over the 103 mile Yuma-Ajo segment, and 1,992 over the 83 mile Ajo-Phoenix segment or 8,682 revenue passenger miles per day. At a net return of 6 cents per passenger mile[16] this would be equivalent to passenger revenues of $520.92 daily, or 38.5 cents per plane mile. Freight, express, and excess baggage should produce some additional revenues. Upon the basis of Western's 1949 experience this should be about 4 percent of passenger revenues, or 1.5 cents per mile. Added to passenger revenues, this would make total non-mail revenues of 40 cents per revenue mile.

As hereinafter pointed out on fully allocated basis Western should be able to provide this service at less than 60 cents per revenue plane mile. This would leave 20 cents per revenue mile plus profit to be paid by the Post Office Department for mail transportation.

Assuming 2 round trips daily and an operating performance of 98 percent 483,610 revenue plane miles would be flown annually. At 20 cents per mile the break-even need would be approximately $96,722. In addition to intrasegment revenues above estimated, additional revenues which should substantially exceed the costs involved would be generated from passengers who traveled beyond San Diego and Phoenix. If these passengers were carried by the local San Diego-Phoenix operator, the extrasegment revenues thus generated would reduce that carrier's need for mail pay. If they were transferred to another carrier, that carrier's mail pay needs would

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[16]Western estimates a net return of 6.2 cents per revenue passenger mile assuming competitive fares between Phoenix and Los Angeles and San Diego and fares at current level to intermediate points and one-half of tickets sold at round-trip discount.

be decreased unless it was a service rate carrier. In any event extrasegment revenues would further reduce the burden on the Federal Government. Furthermore, the service provided would have some value to the Post Office Department. It is concluded that the actual annual subsidy would be substantially less than the indicated $96,000.

According to the latest U. S. Census both California and Arizona are two of the most rapidly growing states in the nation. This growth is expected to continue. Specifically the Imperial Valley and Yuma areas should continue to grow as more of the fertile land is brought under irrigation and the recent increase in plant facilities at Ajo should tend to increase the population of that city. With these expected increases in population and industrial activities the market for air travel would likewise increase with a corresponding decrease in subsidy mail payments. In view of the isolation of the communities involved and the increased use of air transportation which will develop in the future, it is concluded that the probability of decreasing mail needs in the future justify an experimental service for three years between San Diego and Phoenix, via El Centro, Yuma and Ajo.

Los Angeles-Phoenix Inland Route: Southwest proposes a route between Los Angeles and Phoenix via Ontario-Pomona, Riverside-San Bernardino, Banning-Beaumont, Palm Springs, Indio, and Blythe, and a segment between Indio and El Centro, connecting this route with the Los Angeles-San Diego-Phoenix route. Western and Bonanza have indicated that they are willing to accept such a route or any similar route which the Board finds required in this area. In addition, the Board has directed Western to show cause why its authority to serve Palm Springs and

San Bernardino should not be suspended. Consequently, the Board can, if the public convenience and necessity so requires, substitute the proposed services of Southwest or Bonanza at these points for those of Western.[17]

The conomic characteristics of the cities on this route are set forth in the Examiner's report in the original proceeding herein and do not need to be repeated now. Later data of record discloses that these cities have increased in population and that there has been a steady industrial and agricultural development.

Ontario and Pomona, with a combined population of 57,980, are located 45 miles from Los Angeles, San Bernardino and Riverside, 22 miles to the east, have a combined population of 109,093. San Bernardino is a certificated point on Western's route No. 13 and receives service through Ontario. Air mail service to these communities is also provided by Los Angeles Airways helicopter operations.[18] Good highways exist between these communities and Los Angeles but the entire area is urban in nature which results in severe traffic congestion.

Banning-Beaumont are two small cities with a combined population of 10,165, located 26 miles from San Bernardino and 22 miles from Palm Springs. Good highways are available between Palm Springs and Banning-Beaumont.

Palm Springs, population 7,428, is a popular winter resort area which has been gradually extending its season

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[17]The legal power of the Board to suspend any of Western services, which that carrier contests, is discussed hereinafter in this report.

[18]Los Angeles Airways has recently been certificated to provide passenger service with rotary wing equipment to these communities. Los Angeles Airways Certificate Renewal Case, Docket No. 3800, decided July 5, 1951.

during the last few years. Now several of the hotels and motels keep open all year.

Indio, population 5,281, is a desert community located about 20 miles east of Palm Springs. Blythe, primarily an agricultural city located on the California-Arizona border, has a population of 4,085, is 83 miles from Indio, 156 miles from Phoenix, and approximately 65 miles from Yuma.

All of the proposed cities have had substantial population increases since 1940 ranging from 39.2 percent for Riverside-San Bernardino to 130 percent for Ontario-Pomona.

The principal community of interest of the cities on this route is with Los Angeles although Blythe does have a substantial interest with Phoenix as indicated by hotel registration data. However, even with reference to Blythe the registrants from Los Angeles outnumber those from Phoenix by a ratio of 7 to 1.

During the period January through September 1950 Western provided two round trips daily to San Bernardino. One flight was with DC-3 equipment operating between San Bernardino and Los Angeles during the summer. The other flight was a Convair serving San Bernardino as an intermediate point between Los Angeles and Las Vegas. During this period San Bernardino generated 1,472 passengers, of which 483 originated at or were destined for San Francisco, 314 Los Angeles, 143 Las Vegas, 96 Salt Lake City, 46 Seattle, 35 Denver, 28 Portland and 19 Palm Springs. During this period only 21 of these passengers originated at or were destined for points to which more direct service would be available through the Phoenix gateway than through the Las Vegas gateway.

On the basis of the above data it would appear that San Bernardino has its greatest community of interest with Los Angeles and San Francisco and that it has a comparative minor interest with Phoenix. This conclusion is supported by the hotel registration data of record.

During the first nine months of 1950 Western served Palm Springs with two round trips daily during the first four months and one round trip daily the following five months. For the first nine months of 1950 Western generated 5,267 passengers at Palm Springs, of which 3,047 originated at or were destined for Los Angeles, 1,037 San Francisco, 289 Las Vegas, 199 Seattle, and 135 Portland. Only 39 of these Palm Springs passengers originated at or were destined for points to which more direct service would be available through the Phoenix gateway than through the Las Vegas gateway. Hotel registration data also indicate an insignificant community of interest between Phoenix and Palm Springs.

Conclusion: As indicated previously San Bernardino and Palm Springs are certificated points on Western's route No. 13. Due to the unavailability of a satisfactory airport, San Bernardino receives service through the Ontario Airport with the result that Ontario-Pomona have more convenient air transportation facilities than does San Bernardino. Banning, Beaumont, and Indio are not certificated points but each has air service available within a distance of 26 miles, 32 miles, and 18 miles, respectively, at Palm Springs. Paved highways are available and the inconvenience of surface transportation to the Palm Springs Airport is alleviated by the elimination of the necessity for three landings within a distance of 50 miles. San Bernardino has year-round service in both directions and Palm Springs has year-round service to Los Angeles

and service to the east through Las Vegas during the winter.

Considering the proximity of these communities to Los Angeles, this type of service is sufficient to satisfy their principal air transportation needs. If sufficient traffic is available to warrant a year-round Palm Springs service to the east Western can easily drop a Los Angeles-Las Vegas flight into that airport. No service to Phoenix is provided but data of record indicate no substantial need for expeditious transportation to that city.

Blythe is 107 miles from Palm Springs, 150 miles from Phoenix and approxiamtely 75 miles from Yuma. As previously indicated a Phoenix-Los Angeles route via Palm Springs and San Bernardino would generate an insignificant amount of traffic bound for Phoenix and points east. Consequently, the route segment between Palm Springs and Phoenix would be 250 miles in length and due to Blythe's small population would generate very few passengers, with the result that any carrier operating this segment would operate with very light load factors requiring substantial subsidies from the Federal Government. Although Blythe is an isolated community with no direct passenger rail service, the potential traffic would not justify the establishment of a route segment between Palm Springs and Phoenix via Blythe.

Nor does there appear any need for air service between San Bernardino and Palm Springs on the one hand, and El Centro, Yuma and Ajo on the other. Out of 88,700 estimated monthly hotel registrants at Banning, Beaumont, Indio, Ontario, Pomona, Palm Springs, San Bernardino, Riverside, Redlands, and Colton only 657 or less than three-fourths of one percent were from Ajo, El

Centro, Brawley, Calexico, and Yuma. Out of 33,368 registrants at the latter group of cities, only 1,326 or less than 4 percent were from the former group of cities. During September 1946, the only survey month during which Western provided a direct Palm Springs-El Centro service only one local passenger was generated.

Western provides no service between these points now and as hereinbefore stated no needs exist for service between San Bernardino or Palm Springs on the one hand and the points east of San Diego on the proposed Phoenix route.

American and TWA now provide Los Angeles-Phoenix service. During June 1951, 12 westbound schedules and 10 eastbound schedules were operated daily, the majority with 4-engine equipment. During the period May 1, 1949-April 30, 1950, American's average local load factor between Phoenix and Los Angeles was less than 30 percent in each direction. During September 1949 and March 1950, TWA had average load factors between Phoenix and Los Angeles of approximately 56 percent. One flight operated with a 91 percent load factor but no other flight averaged over 76 percent. During these same months TWA carried substantially more passengers between Phoenix and the east than between Phoenix and the west, indicating a sufficiency of seats in the latter direction inasmuch as that carrier originates or terminates no flights at Phoenix.

It thus appears that with frequent high speed schedules in both directions between Los Angeles and Phoenix, no need exists for additional service to meet the needs of terminal-to-terminal passengers.

During June, 1951, Western served Palm Springs and San Bernardino in the following manner: one DC-3 round

trip was operated between Los Angeles and Palm Springs via San Bernardino, departing from Los Angeles at 1:15 P. M. and arriving at Palm Springs at 2:20 P. M.; departing from Palm Springs at 2:50 P. M. and arriving at Los Angeles at 3:50 P. M.; one round trip daily between Las Vegas and Los Angeles via San Bernardino departing from Las Vegas at 8:50 A. M. and arriving at Los Angeles at 10:55 A. M.; and departing from Los Angeles at 5:50 P. M. and arriving at Las Vegas at 7:50 P. M. During the winter Western served both San Bernardino and Palm Springs on Los Angeles-Las Vegas flights using Convair equipment.

This pattern of service would seem to meet the basic air service needs of the San Bernardino-Palm Springs area with the possible exception that Palm Springs should have one summer schedule to Las Vegas to provide direct air transportation to the East for Palm Springs, Beaumont-Banning, and Indio.

Western submitted estimates of the financial results of its San Bernardino and Palm Springs operations on both an out-of-pocket and a fully allocated cost basis.

Passenger revenues were obtained by expanding its first quarter 1950 experience to a year using the 1949 seasonal variation index.[19] On this basis Western estimates that it would generate 1,180 San Bernardino passengers annually from which it would obtain revenues of $10,667. Freight and express revenues figured at 3.95 percent of passenger revenues, the 1949 experience, amounted to 421, making total non-mail revenues of $11,088.

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[19]Los Angeles seasonal variation used for San Bernardino which was not served during most of 1949. Palm Springs was not served during summer 1949 so seasonal variation was estimated.

Additional costs on the out-of-pocket basis at this city were estimated at $27,545, leaving a deficit of $16,457. Total operating costs per mile on this basis are 73 cents. On a fully allocated basis, Western estimated total operating expenses of $34,330 or a per mile cost of 90 cents. This would result in a deficit of $23,241.

At Palm Springs Western estimated 9,122 annual passengers who would produce revenues of $102,186. Mail and express revenues computed on the same basis as for San Bernardino amounted to $4,036, making total non-mail revenues of $106,222. On an out-of-pocket basis total operating costs were computed at $37,762 yielding a non-mail profit of $68,461. On a fully allocated basis, total expenses would be $47,546 providing a profit of $58,627. According to Western's estimate, on the out-of-pocket basis it would obtain from the combined San Bernardino-Palm Springs operation a non-mail profit of $52,-004. This would be reduced to $35,436 on a fully allocated basis.

The above estimates show a profit for the Palm Springs operation and a loss for San Bernardino, but actually the Palm Springs costs cannot be divorced from those for San Bernardino as flying costs between Los Angeles and San Benradino are charged to San Bernardino and would not be substantially reduced if service to that city were discontinued.

On a per plane mile basis, Western predicts out-of-pocket costs for the San Bernardino-Palm Springs operation of 65 cents. On a fully allocated basis, this would be 81 cents per mile.

As a check on Western's estimate reference can be made to Public Counsel's estimate that on a fully allocated basis, Western's operating costs for its entire proposal

would be approximately 56 cents per mile. It is concluded that Western's actual additional costs involved in serving San Bernardino and Palm Springs are no greater than its estimates made on fully allocated basis and that they are probably less.

Furthermore, inasmuch as Western's service to San Bernardino was not inaugurated until October 1949, the full traffic potential of that city had not been developed by the first quarter of 1950, the base period for Western's estimate. For example, during the 6 months, April through September, of that year Western generated 1,216 San Bernardino passengers as compared with its annual estimate of 1,180. As Western's service becomes more firmly established and better known, the traffic volume will continue to increase. For example, during the year ended March 31, 1951[20] Western generated 1,633 originating passengers only as contrasted with its estimated 1,180 annual originating and terminating passengers. During the first quarter of 1951 Western obtained 519 originating passengers at San Bernardino as contrasted with 156 such passengers during the first quarter of 1950 and 256 total passengers during that period. Although a comparison of Western's Form 41's with exhibits submitted in this proceeding shows some slight discrepancies in originating passengers for the second and third quarters of 1950, the substantial increase in traffic indicated by the Form 41's buttresses the belief that estimates based on first quarter 1950 traffic are substantially too low.

On the other hand, Palm Springs generated only 2,021 passengers during the summer of 1950 as contrasted with Western's estimate of 3,336. This, however, was the first

[20]Form 41's submitted by Western.

summer since 1946 that Western had served this city. The increasing number of resorts in this area which are remaining open the year round will increase Palm Springs summer traffic and Western's estimates of the total annual Palm Springs traffic appears reasonable.

During the year ended March 31, 1951[21] Palm Springs originated 4,701 passengers as contrasted with Western's estimate of 9,122 originating and terminating passengers. During the first quarter of 1951, Palm Springs originated 2,495 passengers as contrasted with 1,629 during the same quarter of 1950. These figures indicate that although the Palm Springs summer traffic in 1950 was less than that estimated, the total traffic for the year ended March 31, 1951 approximated Western's prediction.[22]

It is concluded that due to the increased use of air transportation at San Bernardino, the total non-mail revenues from that city and Palm Springs will substantially exceed the $117,311 estimate and that Western can serve these cities with a substantial profit before mail pay.

The use of the Las Vegas gateway for traffic to the East is more convenient and economical than the service via Phoenix proposed herein. Western requires only 7 additional flight miles to serve San Bernardino on flights to Las Vegas and only 49 additional flight miles to serve both San Bernardino and Palm Springs on such flights.

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[21]Form 41 Reports submitted by Western.

[22]Assuming the number of terminating passengers averaged 5 percent less than the number of originating passengers—the ratio indicated by Western's experience during the first 9 months of 1950—Western would have carried 9,167 Palm Springs passengers annually as contrasted with its estimate of 9,122.

On the other hand to provide service from these cities to the East through the Phoenix gateway would require a 259 mile extension from Palm Springs to Phoenix.[23]

The establishment of a local service route between San Diego and Phoenix as hereinbefore recommended would not eliminate the operational and economic difficulties inherent in providing a San Bernardino-Palm Springs service to Phoenix. Although a Los Angeles-Palm Springs flight could be extended to El Centro connecting with the San Diego-Phoenix route at this point, this would result in either (1) the heaviest scheduling over the weakest segment, *i. e.,* El Centro to Phoenix or (2) connecting service at El Centro for passengers to the east, with its attendant inconveniences.

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In view of the foregoing discussion it is concluded that the public convenience and necessity require service by Western between Palm Springs and San Bernardino on the one hand, and Los Angeles and Las Vegas on the other, and that the public convenience and necessity do not require any other or additional service to Ontario-Pomona, San Bernardino-Riverside, Banning-Beaumont, Palm Springs, Indio, * * *.

Accordingly, it is recommended that the applications be denied and that Western's certificate for route No. 13 be suspended insofar as it authorizes a direct service between either San Bernardino or Palm Springs on the one hand, and El Centro or Yuma on the other.[26]

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[23]As indicated previously no need exists for Los Angeles-Phoenix through flights and any service authorized should be subject to local service restrictions inhibiting the generation of Los Angeles-Phoenix passengers.

[26]Western's contention that such a suspension beyond the power of the Board is hereinafter discussed.

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Comparative Costs: Southwest contends that it is a lower cost DC-3 operator than Western. For purposes of comparison Southwest argues that the costs of landings and take-offs and flight equipment depreciation should be eliminated from the cost figures of each carrier. The argument with reference to depreciation on DC-3's is that the amount of depreciation is primarily dependent upon the length of time in use and not to efficient management.

With reference to landing costs Southwest claims that it costs more to land and take-off at a point than to cruise over that point, that due to the short-haul nature of its route Southwest has to make more frequent landings than Western, and that, consequently if landing costs are included a comparison of direct flying costs is distorted. Southwest's landing cost estimate was based on applying the varying fuel and oil costs per hour for the different power ratings Southwest claims it uses in landing and taking off and computing the excess over normal cruising costs. Direct maintenance costs were assumed to vary in direct ratio to fuel and oil costs. Using this procedure Southwest calculated that each landing cost $6.28 more than cruising over the same point.

Eliminating landing costs on this basis from the actual flying costs of Western and Southwest and the flight equipment depreciation costs shown in the Form 41's, Southwest claims that its direct flying costs for the year 1949 were 23.09 cents per mile, as compared with Western's 28.50 cents.

It is conceded that landing at a point involves greater per mile costs than cruising over that point. Southwest makes more landing per mile and, consequently, if costs

of landing were eliminated, Southwest's per mile costs would be reduced to a greater extent than would Western's. But the exact additional cost involved in landing and taking off with a DC-3 is difficult to determine and Southwest's estimate of $6.28 per landing was not substantiated by the evidence. The record shows that the operating practices upon which Southwest based its estimates are not the actual operating practices of that carrier. Accordingly, it can not be determined how much Southwest's operating costs are increased due to its more frequent landings.[30]

Assuming, as Southwest contends, that Western's direct flying costs are 5.41 cents per mile higher than Southwest's, the total cost of each flight between San Diego and Phoenix would be approximately $10 less than a flight by Southwest between Los Angeles and Phoenix via San Diego, or approximately $14,600 annually.

As a rough check of the comparative costs of the applicants reference can be made to cost estimates on a fully allocated basis for the operations proposed by each carrier, prepared by Public Counsel.

Bonanza's costs for operating the Phoenix-Los Angeles segment via Ajo, Yuma, El Centro, San Diego, Oceanside, and Santa Ana-Laguna Beach are estimated at 74.28 cents per mile based on Bonanza's experience for the 9 months ended Sept. 30, 1950.[31] For operating the

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[30]Using the cost per landing and the cruising cost per mile developed by Southwest, based on 3rd quarter, 1950 costs, Southwest's direct operating costs for that quarter would have been $227,182 instead of the $201,470 reported by Southwest. Using the same landing and cruising costs, Southwest's estimate of the additional costs involved in providing its proposed service would be $450,473 instead of the $293,862 estimated by Southwest.

Phoenix-San Diego segment, via Ajo, Yuma, and El Centro similar figures would be 66.9 cents.[31]

Southwest's costs for its entire proposed operation are estimated at 70.95 cents per mile.[32] Western's costs which included some Convair operations were estimated at 56.60 cents per mile.

These estimates were not prepared for the exact operation herein found needed and would have to be altered somewhat to represent the actual operations recommended. For example, Southwest's and Bonanza's costs for the Los Angeles-Phoenix route would be lowered by eliminating its proposed stops at Oceanside and Santa Ana-Laguna Beach. However, it seems clear that such adjustments would be insufficient to reduce the costs of either company sufficiently to counteract the shorter mileage involved if Western operated the needed service between San Diego and Phoenix.

Southwest contends that Wesern's costs should include the cost of operating between Los Angeles and San Diego inasmuch as Western will be forced to carry a substantial number of the passengers generated on the San Diego-Phoenix segment to Los Angeles and points north.

It is true that this factor would increase Western's costs to some extent. However, during June, 1951, Western operated 181 seats each way between San Diego and

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[31]Depreciation charged for one plane. Bonanza's schedules for its existing system submitted at the hearing and its schedules for June 1951 from the Official Airline Guide show that its daily schedules can be operated with two planes—allowing one additional plane for a spare three should be sufficient for its scheduled services. Bonanza's proposed schedules for its existing system would require the operation of three planes daily—allowing one additional plane for a spare, four should be sufficient for its proposed services.

[32]$27,005 for overhead was eliminated from the estimate pursuant to the suggestion of the sponsoring witness.

Los Angeles. Although the present load factors are not available, Western operated over this segment in March and September, 1949, with average load factors of less than 50 percent. If the ratio of passengers from points east to San Diego to points north thereof remains the same as for the 8-month test period during 1950, then, on the basis of the traffic estimates hereinbefore set forth, approximately 14 additional passengers would travel over the San Diego-Los Angeles segment each way daily. This additional traffic could be accommodated easily without additional equipment.

It is recognized that the point at which a schedule might be added or eliminated between San Diego and Los Angeles would be affected by the number of passengers generated east of San Diego. However, this effect is too speculative and nebulous to justify including Western's Los Angeles-San Diego flight mileage in an economic comparison with the other applicants. Furthermore, the non-mail revenues hereinbefore estimated were limited to intra-segment mileage between San Diego and Phoenix, but actually Western could generate substantially greater revenues for itself by transporting passengers to other points on its system than could either Southwest or Bonanza.

Even assuming that Western's costs would be increased somewhat by additional costs between Los Angeles and San Diego, such additional expense would not appear sufficient to offset the substantially heavier cost of Southwest and Bonanza above indicated.

Giving consideration only to the actual cost of operations and through service benefits, Western's selection would be more in the public interest than that of either of the other applicants.

* * * * * * * * *

But, before recommending Western it is necessary to consider its fitness, willingness, and ability to provide the proposed services. Western states that it is willing to provide any transportation required in the area in issue, but to determine its fitness, willingness and ability, previous actions must be considered as well as promises for the future. An examination of Western's previous service to El Centro and Yuma is in order.

Western was prevented by World War II from inaugurating service to El Centro until 1946; at that time Western established two round trips daily to Los Angeles and generated a substantial number of passengers.[34] This service was operated for only one year. Shortly thereafter service was dropped to one round trip daily and a little later to three round trips weekly. This type of service continued until January, 1950.

When Yuma was added as a certificated point Western provided that city with only three round trips weekly until January, 1950, when it inaugurated two round trips per day between San Diego anad Yuma via El Centro. This type of service has been continued since that time.

The type of service Western provided El Centro and Yuma during 1947 through 1949 clearly did not meet the minimum requirements for adequate service. The Board has stated that as a general rule, two round trips daily are necessary for adequate service.[35] In the original California-Nevada Service Case[36] the Board reiterated

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[34]In September 1946, El Centro generated 591 passengers.
[35]North Central Case, 7 C. A. B. 639, 680 (1946).
[36]10 C. A. B. 405, 429 (1949).

this rule but stated that in certain situations one daily round trip might be sufficient. But nowhere has it been indicated that three round trips weekly is sufficient for local short-haul service. This service was so useless that the Post Office Department did not designate any schedules for mail service and the traffic receded from 591 at El Centro in September, 1946, with two round trips daily, to 327 during March, 1947, with one round trip daily, to 97 in September, 1947, with three round trips weekly. During the 1948 survey months El Centro generated an average of 109 passengers monthly and in 1949, 73. At Yuma 60 passengers were generated in September, 1947, and during the 1948 and 1949 survey periods an average 55 and 26 monthly passengers, respectively. It was only after the Board had authorized Southwest to provide local service between Los Angeles and Phoenix via San Diego, El Centro, Yuma, Ajo, and other points and had ordered Western to show cause why its authorizations to serve El Centro, Yuma, San Bernardino, and Palm Springs would not be suspended that Western became interested enough in providing El Centro and Yuma with service to install two round trips daily. This belated euthusiasm appears to have resulted from three factors, none of which involved fulfilling its duty to provide these cities with the service needed. First, Western feared competition from Southwest on its Los Angeles-San Diego segment; second, the authorization of Southwest to provide San Diego-Phoenix service rekindled Western's ambitions and hopes for a San Diego-Phoenix route; and third, Western

feared that it might be suspended at San Bernardino and Palm Springs as well as at El Centro and Yuma.[37] Consequently, Western decided to establish more frequent schedules to the points proposed for suspension. Although Western presented no affirmative case to show that additional San Diego-Phoenix terminal-to-terminal service was needed and consented to accept a restriction on its San Diego-Phoenix operation inhibiting effective competition for San Diego-Phoenix and Los Angeles-Phoenix traffic, Western's protestations are not convincing. Based on Western's previous record it would appear that its primary interest in this proceeding is to obtain an unrestricted San Diego-Phoenix route and to use the local service operation as a "stepping stone" or "hat in the door" method of accomplishing this result. It can easily be anticipated that in the event this aim is achieved in this proceeding Western will return to the Board in a short time with an application requesting the lifting of the local service restriction and a story that unless supported by terminal-to-terminal traffic the El Centro-Yuma-Ajo segment will never be economically justified. Based on the record to date Western appears to be a very "reluctant dragon" when it comes to service to El Centro, Yuma, and Ajo. It should be noted that Western did not propose service to Ajo in this proceeding and has shown no interest in the air service needs of that city despite the Board's authorization of Ajo service several years ago. It has expressed a willingness to serve Ajo if the Board finds that such service is required.

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[37]Palm Springs and San Bernardino can be served on Los Angeles-Las Vegas flights and Palm Springs is a comparatively strong traffic producer during the winter.

Western's treatment of El Centro and Yuma is understandable if not excusable. Western at all times proposed service to El Centro and Yuma on a San Diego-Phoenix route and contended that only with such an operation could satisfactory service be provided in an economical manner. The present record appears to support that contention. When Western failed to obtain that authorization it did some experimenting in attempt to find some economical way to provide adequate service to these cities and then abandoned the job as hopeless. It apparently decided to cut its operating minimum and concentrating its equipment and efforts on more lucrative markets. This practice, if followed by a business operating in a free market, would be sound operating procedure. But the recipient of a certificate of public convenience and necessity receives not only special privileges, such as a right to operate with limited competition and the right to subsidy mail payments, if needed, but also the duty to provide adequate service.

Although Western's interest in providing the local service herein required is substantially less than that of the other two applicants and its primary interest appears to be an extension to Phoenix, it is now and has for the past year and one-half provided two round trips daily to El Centro and Yuma and states a willingness to provide any service herein found needed.

* * * * * * * * *

SUSPENSIONS.

The Board ordered Frontier to show cause why its certificate authorizing service between Phoenix and Yuma via Ajo should not be suspended. Frontier has not opposed this proposal. For reasons hereinbefore stated it appears that a local service route between San Diego and

Phoenix via El Centro, Yuma, and Ajo should be authorized and that the traffic segment between Phoenix and Yuma is too thin to justify service for two carriers. It further appears that service to Ajo and Yuma on a San Diego-Phoenix route is more in the public interest than the Phoenix-Yuma route authorized for Frontier. Accordingly, it is concluded that the public convenience and necessity require suspension of that part of Frontier's certificate for Route No. 93 which authorizes service between Yuma and Phoenix via Ajo.

It is contended, however, that such a suspension and the suspension hereinbefore recommended of Western's authority to operate between San Bernardino and Palm Springs on the one hand, and El Centro and Yuma on the other, will in fact be a revocation of a certificate and the Board is without power to take such action without complying with the revocation provisions of the Act. These contentions have previously been considered by the Board. In the Carribean Area Case,[39] it was contended that the Board was without power to impose restrictions on an unrestricted operation. The Board in that case did impose such restrictions. In All American Air, Suspension Case, 10 C. A. B. 24 (1949), one of the issues was whether the Board could suspend a route indefinitely upon a finding that public convenience and necessity so required. In that case the carrier involved consented to suspension under certain conditions. The Board did not comply with those conditions and suspended the route for an indefinite period and held that it had the authority under the Act to do so whether the suspen-

[39]9 C. A. B. 534, 545-554 (1948).

sion was for a definite or indefinite period. Accordingly, although neither Western nor Frontier have consented to the suspension of any of their authorizations, it is concluded that the Board has the power to make such suspensions. It is recommended that the Board suspend Frontier's Yuma-Phoenix authorization pending decision on the renewal of its certificate or the expiration of the temporary authorization of Yuma-Phoenix service by Western herein recommended, whichever occurs first. Likewise Western's authorization of a Yuma-Phoenix route should terminate in the event Frontier's Yuma-Phoenix route is renewed.

Rescission.

Southwest contends that it was granted a certificate to operate between Los Angeles and Phoenix via San Diego and other intermediate points, and that such certificate has not been revoked. It argues that the Board does not have the power to rescind such a certificate without complying with the procedural requirements of section 401(h) of the Act with reference to suspension or revocation and inasmuch as the Board has not done so Southwest is still possessed of a legal certificate for this route.

This contention is unsound. The order granting the certificate provided that the Board reserved the right to extend the effective date of the certificate from time to time. These provisions were specifically inserted to take care of situations such as this where the Board might reconsider the authorization granted in the original opinion. See Kansas City-Memphis Case, Supplemental

Opinion, 9 C. A. B. 401 (1948), in which the Board stated that in the future certificates would be issued with the provision that they would not be effective until all petitions for reconsideration had been determined to prevent any question about the power of the Board to rescind such certificates on reconsideration. See also Pan American Airways, Inc., North Atlantic Route Amendment, 7 C. A. B. 849 (1947) in which the Board rescinded and modified a certificate previously issued to Pan American by mistake. Accordingly, it is recommended that Southwest's contention that the Board's order rescinding its certificate for the Los Angeles-Phoenix segment be dismissed.

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Orders
Serial Number E-6040

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 17th day of January, 1952.

In the matter of the Reopened Additional California-Nevada Service Case. Docket No. 2019 *et al.*

ORDER.

A full public hearing having been held in the above-entitled proceeding and the Board upon consideration of the record having issued its opinion, containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That amended certificates of public convenience and necessity in the forms attached hereto shall be issued to Bonanza Air Lines, Inc., for Route No. 105, Western Air Lines, Inc., for Route No. 13, and Frontier Airlines, Inc., for Route No. 93;

2. That said amended certificates shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary and, subject to the extension of their effective dates in accordance with the provisions of said amended certificates, shall be effective on March 17, 1952.

3. That, except to the extent granted herein, the applications of Western Air Lines, Inc., in Docket No. 3976, Southwest Airways Co., in Docket No. 2899, and Bonanza Air Lines, Inc., in Docket No. 4044, be and they hereby are denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary.

(Seal)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Temporary Certificate of Public Convenience and Necessity for Local Service (as amended).

BONANZA AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Reno, Nev., the intermediate points Carson City-Minden, Hawthorne and Tonopah, Nev., Death Valley, Calif., Las Vegas and Boulder City, Nev., Kingman, and Prescott, Ariz., and the terminal point Phoenix, Ariz.;

2. Between the coterminal points Los Angeles and Long Beach, Calif., the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma, and Ajo, Ariz., and Blythe, Calif., and the terminal point Phoenix, Ariz.,

to be known as Route No. 105.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto.

(3) On each trip operated by the holder over all or part of one of the two route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (1) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the requirements of such condition, (2) the holder is authorized by the Board to suspend service, or (3) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control.

(4) Each trip scheduled between the coterminal points Los Angeles and Long Beach, Calif., on the one hand, and the intermediate point San Diego, Calif., on the other shall originate or terminate at Phoenix, Ariz.

(5) The holder shall not serve Ajo, Ariz., and Blythe, Calif., on the same flight.

(6) The authority herein to serve Death Valley, Calif., shall be effective only between October 1 and

April 30, inclusive, of the period during which this certificate, as amended, shall be effective.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on March 17, 1952, and shall continue in effect up to and including December 31, 1952: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of January 17, 1952 (Order Serial No. E-6040), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board on the 17th day of January, 1952.

/s/ Donald W. Nyrop,
Chairman.

(Seal)

Attest:
/s/ M. C. Mulligan,
Secretary.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Certificate of Public Convenience and Necessity
(as amended)

WESTERN AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail as follows:

> Between the terminal point San Diego, Calif., the intermediate points El Centro, Calif., Yuma, Ariz., Palm Springs, San Bernardino, Long Beach, and Los Angeles, Calif., Las Vegas, Nev., St. George, Cedar City and Richfield, Utah, and the terminal point Salt Lake City, Utah,

to be known as Route No. 13.

The service herein authorized is subject to the following terms, conditions, and limitations:

> (1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.
>
> (2) The holder may continue to serve regularly any point named herein through the airport last

regularly used by the holder to serve such point prior to the effective date of this certificate, as amended; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder's authority to serve El Centro, Calif., and Yuma, Ariz., shall be suspended up to and including December 31, 1952, or until the date upon which the Board shall have finally determined a timely filed application by Bonanza Airlines, Inc., for renewal of Segment No. 2 of route No. 105, whichever shall last occur: *Provided,* That such suspension shall not become effective until thirty days after the effective date of this certificate, as amended.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on March 17, 1952: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of January 17, 1952 (Order Serial No. E-6040), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 17th day of January, 1952.

/s/ Donald W. Nyrop,
Chairman.

(Seal)

Attest:
/s/ M. C. Mulligan,
Secretary.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Temporary Certificate of Public Convenience and Necessity for Local Service (as amended).

FRONTIER AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Phoenix, Ariz., the intermediate point Ajo, Ariz., and the terminal point Yuma, Ariz.;

2. Between the terminal point Phoenix, Ariz., the intermediate points Superior, Ariz., Globe-Miami, Ariz., Safford, Ariz., Clifton-Morenci, Ariz., Lordsburg, N. Mex., Silver City-Hurley, N. Mex., Deming, N. Mex., and Las Cruces, N. Mex., and the terminal point El Paso, Tex.;

3. Between the terminal point Phoenix, Ariz., the intermediate points Casa Grande, Ariz., Tucson, Ariz., Nogales, Ariz., Bisbee, Ariz., and Douglas Ariz., and the terminal point Lordsburg, N. Mex.;

4. Between the terminal point Phoenix, Ariz., the intermediate points Prescott, Ariz., and Flagstaff, Ariz., and the terminal point Winslow, Ariz.

to be known as Route No. 93.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto.

(3) On each trip operated by the holder over all or part of one of the four numbered route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (i) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the requirements of such condition, (ii) the holder is authorized by the Board to suspend service, or (iii) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control.

(4) On each trip scheduled between Albuquerque, N. Mex., and Phoenix, Ariz., the holder shall schedule stops at a minimum of three points between said points.

(5) On each trip scheduled between Denver, Colo., and Phoenix, Ariz., the holder shall schedule stops at a minimum of six points between said points.

(6) The holder shall comply with the conditions set forth in ordering paragraphs Nos. 6, 7, 8 and 9 of Order Serial No. E-4050, dated April 10, 1950, Dockets Nos. 3977 and 4011.

(7) The holder's authority to serve segment "1" is suspended.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on March 17, 1952, and shall continue in effect until the holder's application for renewal thereof in Docket No. 4522 shall have been finally determined by the Board: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of January 17, 1952 (Order Serial No. E-6040), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

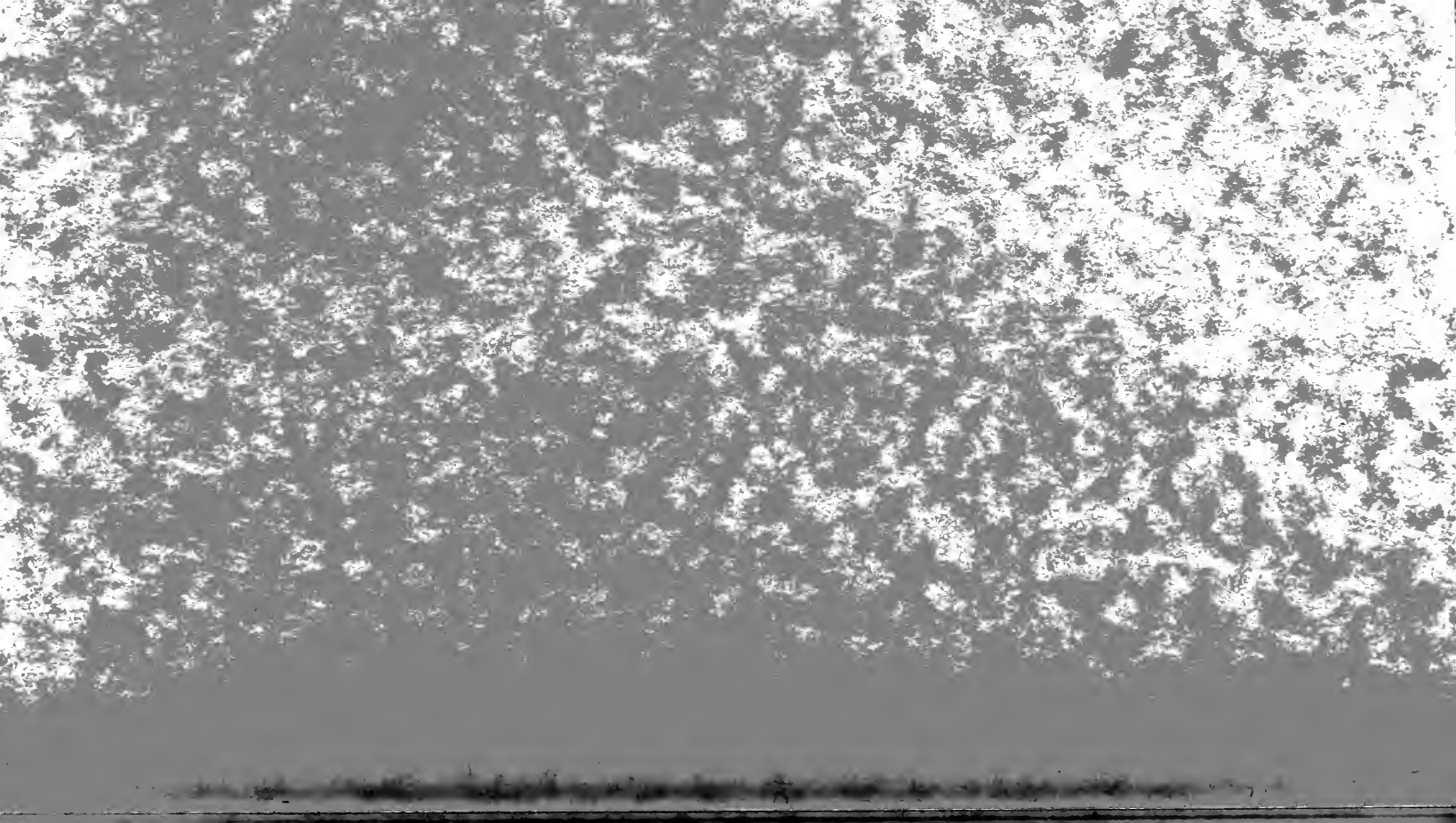
In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 17th day of January, 1952.

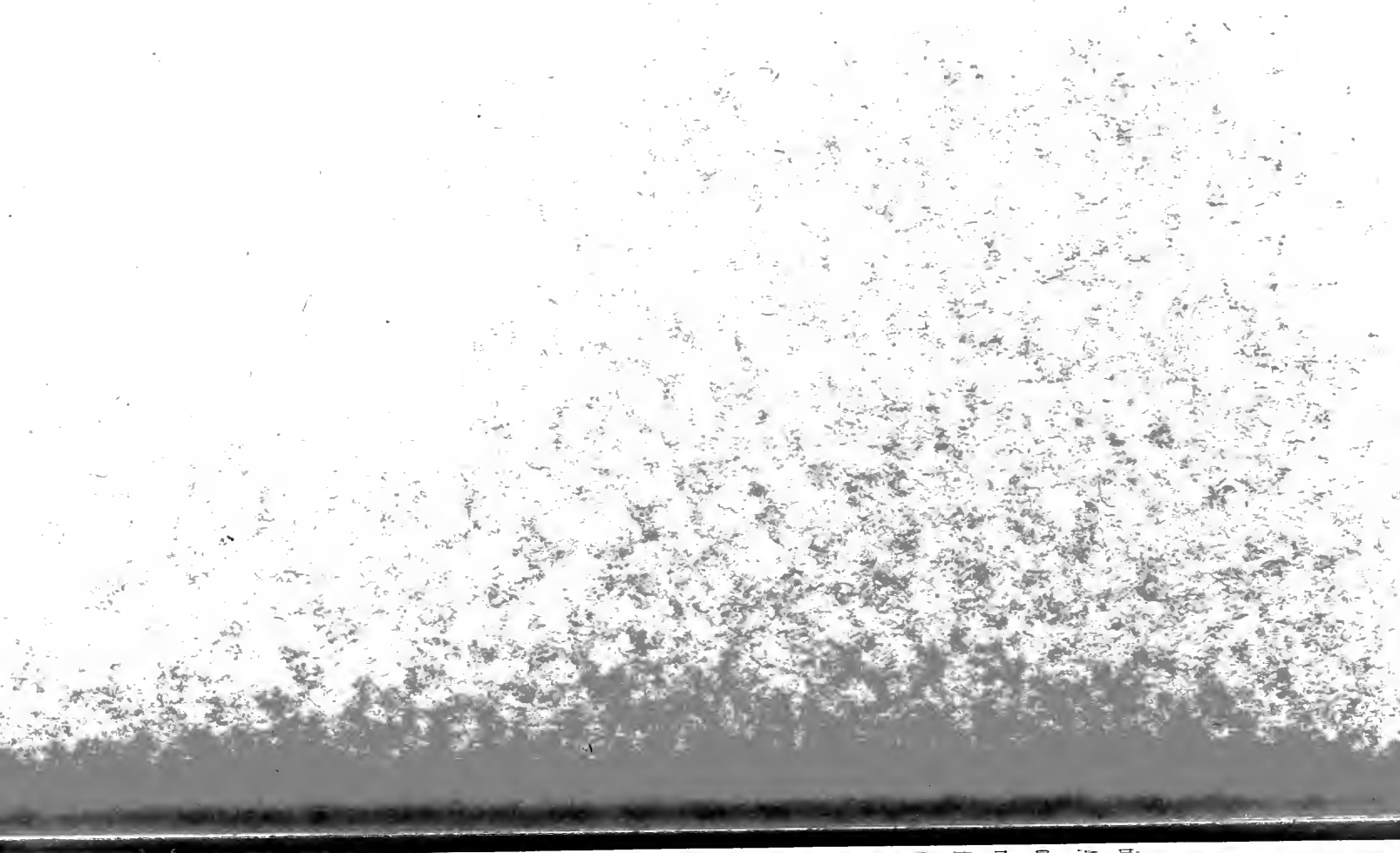
/s/ Donald W. Nyrop,
Chairman.

(Seal)

Attest:

/s/ M. C. Mulligan,
Secretary.





APPENDIX B.

SECTIONS OF THE CIVIL AERONAUTICS ACT.

401(d)(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

* * * * * * * * *

401(e)(1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Authority, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective

date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided,* That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Authority shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

In the

United States Court of Appeals

For the Ninth Circuit

No. 13245

WESTERN AIR LINES, INC.,
Petitioner,
vs.
CIVIL AERONAUTICS BOARD,
Respondent.

BRIEF OF UNITED AIR LINES, INC., AS AMICUS CURIAE.

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DATED: March 10, 1952.

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INDEX.

LIST OF AUTHORITIES CITED.

Cases.

TEXTS AND ARTICLES.

STATUTES.

MISCELLANEOUS.

* Not officially reported.

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JURISDICTION.

This proceeding involves a petition filed by Western Air Lines, Inc., for review of a final order of the Civil Aeronautics Board issued on January 17, 1952. Such petition for review was filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, 49 U. S. C. 401, 646, 52 Stat. 973, 1024, and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1001, 1009, 60 Stat. 237, 243.

Section 1006 of the Civil Aeronautics Act provides, in part, that any order issued by the Civil Aeronautics Board shall be subject to review by the Circuit Courts of Appeals

of the United States, or by the United States Court of Appeals for the District of Columbia, on petition filed within sixty days after the entry of such order by any person disclosing a substantial interest therein. Further, the statute provides that such petition for review shall be filed in the court for the circuit in which the petitioner resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, and provides that upon transmittal of a copy of the petition to the Board, the court in which such filing is made shall have exclusive jurisdiction to affirm, modify or set aside the order complained of, in whole or in part, and, if need be, to order further proceedings by the Board.

Section 10 of the Administrative Procedure Act reaffirms the method and manner of review provided for in the Civil Aeronautics Act.

All jurisdictional requirements have been complied with by Western, and its petition for review is properly before this Court.

STATEMENT OF FACTS.

The petition for review herein arises out of a consolidated proceeding before the Civil Aeronautics Board known as the *Reopened Additional California-Nevada Service Case.* At the time of that proceeding, Western Air Lines, Inc., was, and still is, the holder of various permanent Certificates of Public Convenience and Necessity including a permanent Certificate of Public Convenience and Necessity for route No. 13 which, among other things, authorized that carrier to engage in air transportation between San Diego, El Centro, Yuma, Palm Springs, San Bernardino, Long Beach and Los Angeles. At that time, a so-called local-feeder carrier, Bonanza Air Lines, Inc., held a temporary Certificate for route No. 105, which extended between Phoenix and Reno via certain intermediate points.

The proceeding before the Board involved various matters, including (1) an Order of the Board directing Western to show cause why its permanent Certificate for route No. 13 should not be suspended insofar as it authorized service to El Centro, Yuma, San Bernardino and Palm Springs, (2) an application by Western for the extension of its route No. 13 from Yuma to Phoenix, and (3) an application by Bonanza for the extension of its route No. 105 from Phoenix to San Diego and Los Angeles via certain points including El Centro and Yuma.

By its opinion and order entered on January 17, 1952, Serial No. E-6040, the Board denied Western's above described application but granted the application of Bonanza and extended its route from Phoenix to Los Angeles and Long Beach via Blythe, Ajo, Yuma, El Centro, San Diego,

Oceanside and Santa Ana-Laguna Beach. By that same order, the Board also directed the "suspension" of the authorizations contained in Western's certificate for route No. 13 with respect to the cities of El Centro and Yuma. In effect, the Board has directed the substitution of Bonanza to provide the services to and from El Centro and Yuma previously conducted by Western. The period of "suspension," as stated in the order is up to and including December 13, 1952, or until the date upon which the Board shall have finally determined a timely filed application by Bonanza for renewal of its certificate for route No. 105, whichever shall last occur.

It is the Board's opinion and order of January 17, 1952, which is the subject of review before the Court. The order is challenged as being legally invalid for the reasons hereinafter set forth.

Certain aspects of the Board's above described action, all of which are discussed in greater detail subsequently, pervade this entire proceeding and have a major bearing upon the issues presented. The first of these is that the suspension of Western directed here is part of a much larger program of the Board for the realignment of substantial segments of the domestic air route map. Additionally, there is also the fact that the suspension of Western, although stated for a period, actually is for an indefinite term, if not permanent, and, therefore, tantamount to revocation of Western's permanently certificated authority with respect to El Centro and Yuma. Finally, the Board's action is in fact a substitution of the services of one carrier for those of another. By its "suspension" of Western and concurrent grant to Bonanza of a new route to cities that it has not served, including El Centro and Yuma, the Board proposes to substitute the services of Bonanza for the previously established and permanently certificated authorization of Western as to those cities.

The reason underlying this route realignment program on the part of the Board and its attempt to effect a substitution with respect to Western's service is the lack of economic success of what is commonly known as the Board's "local-feeder service experiment". That experiment, which was undertaken during the past several years, involved the creation of a number of new carriers, generally described as local-feeder carriers, for the purpose of experimenting as to the feasibility of local, short-haul feeder air service at smaller communities. The certificates issued to those carriers were, up to the present at least, for comparatively short periods, usually 3 years. *Rocky Mountain States Air Service,* 6 C. A. B. 695 (1946). The Board itself, in appraising the financial results of the operations of those carriers has said (Order Serial No. E-2680, issued April 4, 1949, p. 3):

> "There is little in the record of feeder air carrier experience to encourage a belief that any of such carriers possess, under presently foreseeable conditions, the inherent characteristics for commercial self-sufficiency. For the twelve-month period ended June 30, 1948, the twelve feeder carriers then in operation experienced total operating expenses which exceeded total commercial revenues by approximately $8,500,000. An additional amount would be required to provide a return on investment. None of the feeder carriers had, as of June 30, 1948, closely approached the status of commercial self-sufficiency."

Notwithstanding this experience, the Board has not terminated its feeder experiment. Instead, it is attempting to suspend the prior authorizations of permanently certificated carriers, such as Western, at a number of points in order to make the traffic and revenues at those points available to the local-feeder operators.

United Air Lines, Inc., requested leave to file this brief as *amicus curiae,* because of its interest as an intervenor in

the proceeding before the Civil Aeronautics Board and because of the importance of the issues here involved to the air transportation industry as a whole. The Board's action here under review exposes every certificated carrier and every city on the air route map to the possibility of involuntary revisions in their service patterns. The decision of this Court upon the extent of the Board's power to impair permanent certificates of public convenience and necessity and to substitute the services of one carrier for those of another, therefore, will be of far reaching significance.

SPECIFICATION OF ERRORS RELIED UPON.

The Petition for Review filed by Western Air Lines, Inc., in this proceeding raises the following issues to be resolved herein:

"1. Did the Board commit legal error in amending Western's certificate of public convenience and necessity for Route No. 13 by imposing a condition purportedly suspending Western's right to serve El Centro, California, and Yuma, Arizona, in the manner and for the period provided?

"2. Did the Board abuse its discretionary power in amending Western's certificate of public convenience and necessity for Route No. 13 by imposing a condition purportedly suspending Western's right to serve El Centro, California and Yuma, Arizona, in the manner and for the period provided?

"3. Did the Board violate the provisions of Section 2, Section 401, and particularly Section 401(h), of the Civil Aeronautics Act of 1938?

"4. Did the Board commit legal error in amending Bonanza's certificate of public convenience and necessity for Route No. 105 by adding Segment No. 2 from Los Angeles to Phoenix by way of the designated intermediate points?

"5. Did the Board abuse its discretionary power in amending Bonanza's certificate of public convenience and necessity for Route No. 105 by adding Segment No. 2 from Los Angeles to Phoenix by way of the designated intermediate points?"

Within the scope of such petition for review, this brief *amicus curiae* is directed specifically to the legal questions as to (1) whether the Board possesses the power to realign the air route map in the area here involved by the action that it has undertaken in this case, (2) whether it can validly direct an indefinite or permanent "suspension" of Western's permanent certificate of public convenience and necessity, and (3) whether the Board has the authority to compel the substitution of the services of Bonanza for the permanently authorized services of Western.

ARGUMENT.

I.

THE BOARD POSSESSES NO POWER TO SUSPEND A CARRIER'S CERTIFICATE FOR THE PURPOSE OF REALIGNING THE ROUTE PATTERN.

The power to forcibly remake the air route map, as the Board proposes here, is beyond the language and intent of the Civil Aeronautics Act. The legislative history of the Act as well as pronouncements by the Board and individual members thereof make it clear that one of the principal objectives of that legislation was to guarantee security of route and to bring about stability in the industry. The instrumentalities through which this was to be accomplished are permanent certificates of public convenience and necessity which form the keystone of civil air transportation. Any attempt to infer the existence of a power, which is not expressly granted by the Act, to compel involuntary revisions in permanently certificated routes in favor of temporarily certificated carriers would undermine the basic structure established under the Civil Aeronautics Act as well as one of its fundamental purposes—stability.

By suspending Western's services and substituting those of Bonanza, the Board is proposing to strengthen Bonanza by requiring Western to turn over to it portions of its routes and revenues. This substitution of the services of a wholly new carrier for the services of an existing carrier is pursuant to a program of the Board's looking toward a broad realignment of substantial segments of the domestic air route pattern. By such action, the Board is seeking to establish a new air pattern to conform with

newly established policies and philosophies with respect to the public convenience and necessity. The Board has freely admitted that it is engaged in such a program of route realignment in its decision in the *Southwest Renewal-United Suspension Case,* Docket No. 3718, *et al.,* decided on January 29, 1952, shortly after the decision in the instant proceeding, and involving a similar involuntary suspension of previously certificated services. The following statement made in that case is most pertinent:

> "We have undertaken a series of investigations looking toward the realignment of the domestic route pattern along more economical lines, of which this proceeding was among the first."

The suspensions of trunkline carriers' services proposed by the Board are not limited to the suspension of Western involved in the instant case. The Board has already instituted more than 15 proceedings involving suspension of points or routes served by various carriers, and other similar proceedings have been instituted upon petition or complaint of feeder carriers competing with trunkline carriers.

If the Board has the power which it claims in this proceeding, no carrier will be secure in its operations, investors will be hesitant to place funds in the industry and private enterprise and initiative will be blunted. It is submitted that the "suspension" of Western's services ordered by the Board in this case is beyond the powers of the Board. Nowhere in the Act does the Board have the power to realign the existing route pattern. Nor is there anything in the Act which would confer such power upon the Board by necessary implication.

1. The Board has only limited statutory authority.

The Board, being an administrative agency created by statute, possesses only those powers conferred upon it expressly or by necessary implication within the four corners of the Civil Aeronautics Act of 1938, as amended. *Arrow-Hart & Hegeman Electric Company* v. *Federal Trade Commission,* 291 U. S. 587, 54 S. Ct. 532 (1934); *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 471 (1942). In the absence of a clear grant of authority, the Board is not warranted in assuming a power through its own construction of the Civil Aeronautics Act unless there exists an unmistakable evidence of intent on the part of Congress that it have such power. Moreover, a permanent certificate of public convenience and necessity such as that provided for under the Civil Aeronautics Act constitutes a property right. Similar certificates issued under the Motor Carrier Act and other acts have been held to confer upon the holder thereof such property interests as entitled them to the protection of the Constitution. *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, 49 S. Ct. 235 (1929); *Rock Island Motor Transit Company* v. *United States,* 90 F. Supp. 516 (1949) (reversed on other grounds 340 U. S. 419, 71 S. Ct. 382). The power to suspend or revoke certificates of public convenience and necessity, being an interference with established property rights, should be strictly construed. 3 Sutherland, *Statutory Construction,* pp. 275-6 (3rd ed., 1943); cf. *United States* v. *Seatrain Lines,* 329 U. S. 424, 67 S. Ct. 435 (1947).

The statutory authority upon which the Board relies to accomplish its objectives of route realignment is contained in Section 401(h) of the Civil Aeronautics Act, which reads as follows:

> "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter,

amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." (49 U. S. C. Sec. 481(h).)

This provision does not confer upon the Board the power to realign the air route pattern. Nor does it confer any power upon the Board to substitute the services of a temporarily certificated carrier for the existing services of a permanently certificated carrier. Nowhere do the words "realign" or "substitute" appear in this provision or in any other section of the Civil Aeronautics Act.

2. Congress did not intend to grant the power which the Board claims.

Examination of the legislative history pertaining to the Civil Aeronautics Act clearly reveals that Congress did not intend to grant the Board power to suspend involuntarily permanent certificates of public convenience and necessity for the purpose of revising on a wholesale scale the existing air route pattern.

In studying the history of the present legislation governing air transportation, the background existing at the

time such legislation was being considered is extremely significant. The power which the Board here claims would violate the very purpose for which the Civil Aeronautics Act was adopted, namely, to establish stability in the air transport industry.

The Civil Aeronautics Act was adopted in June, 1938, after financial losses and chaos had developed in the air transport industry due to the then existing system of competitive bidding for air mail routes and to cut-throat competition. Stability of routes was essential if the industry were to survive the unhealthy situation in which it found itself and if it were to obtain adequate public financing in order to become a progressive and sound industry. In discussing Senate Bill 3845, which became the Civil Aeronautics Act, Senator McCarran, a sponsor of the legislation, said:

> "Mr. President, with the history of this legislation reflecting a long and arduous and zealous study on the part of everyone who has had to do with the subject; with the growing need for progressive legislation; *with demand on the part of industry and on the part of the traveling public for progressive legislation looking first of all to the stabilization of the industry, so that the industry itself may look to financial agents throughout the country to aid the industry*—financial agents who today are questioning whether or not financial aid should be given to the industry, by reason of its uncertainty as an agency—and furthermore in order that the traveling public may know that the Government of the United States is putting forth every effort within its power to see that the greatest measure of safety in the air is brought about, I say that legislation looking to these ends is all essential, and essential at this session of the Congress." (Congressional Record, May 11, 1938, pp. 8764-65; italics supplied.)

The necessity for such stability had likewise previously been pointed out by the Federal Aviation Commission,

which was appointed by President Roosevelt pursuant to the Airmail Act of 1934 to investigate the air transport industry and the aviation industry as a whole. In commenting on the then existing procedures of competitive bidding, the Commission in 1935 reported:

> "* * * To attempt to allocate the right to run lines through a process of competitive bidding is to throw undue emphasis on economy at the expense of quality, and almost to assure on most routes that the winning bidders will be those who establish their operations on the most parsimonious footing. Competitive bidding is a demonstrably successful device for the finding of a contractor to carry on an undertaking for which complete plans and specifications can be furnished and which can be definitely finished and paid for within a reasonably short time. Air transport, as we see it, clearly violates both of these requirements. *The air transport map cannot be redrawn every few years without utterly disastrous effect on the service.* New lines ought to be created on a substantially permanent basis. An airline cannot be casually torn up and transplanted. * * *"
>
> * * * * *
>
> "A certificate once granted should have the quality of a non-exclusive franchise to the extent of being made cancellable *only for good cause or with equitable compensation.*" (Federal Aviation Commission Report, Sen. Doc. 15, 74th Congress, First Session, p. 56; italics supplied.)

The House Committee on Interstate Commerce in reporting on the so-called Lea Bill, H. R. 9738, the House counterpart to S. 3845, had the following to say with respect to the need for aviation legislation:

> "The result of this chaotic situation of the air carriers has been to check the faith of the investing public in their financial stability and to prevent the flow of funds into the industry. Col. Edgar S. Gorrell, president of the Air Transport Association, repre-

> senting substantially all of the scheduled American-flag air lines, testified before your Committee during the public hearings on H. R. 9738 that $120,000,000 of private capital has been invested in the present air-transport system and that 50 per cent of this investment has been lost. He further testified that unless legislation is enacted which would give the carriers reasonable assurance of the permanency of their operation and would protect them from cutthroat competition, a number of the air lines would soon be in serious financial trouble." (Report No. 2254, House of Representatives, 75th Congress, Third Session, April 28, 1938, p. 2.)

In view of this picture, Congress determined that the necessary stability would be achieved through the device of certificates of public convenience and necessity which for all intents and purposes would be permanent. The above cited Report of the House Committee further stated (p. 2):

> "H. R. 9738 would prohibit any person from operating as a common carrier by aircraft unless such person holds a certificate of convenience and necessity, and provides that the rates, regulations, and practices of such air carriers shall be subject to regulation. *Thus, if this legislation is enacted, the air carriers will be able to operate on a stable basis, their routes secured by a certificate of public convenience and necessity, which may be revoked only for cause,* and their rates regulated so as to eliminate cutthroat competition among themselves."

Since the adoption of the Civil Aeronautics Act, the Board and its members have frequently recognized the force of this legislative history and the permanency to be attributed to a certificate of public convenience and necessity. Mr. Ryan, a member since its inception and presently Vice Chairman of the Board, stated in April, 1939:

> "Certificates of public convenience and necessity give

a holder permanent right to the operation authorized, subject only to revocation for violation of the Act." (Ryan, *The Civil Aeronautics Act,* 23 Public Utilities Fortnightly, 518, April 27, 1939.)

In his dissent from the Order of the Board in *Chicago and Southern Suspension Investigation,* Docket No. 2834 (Order, Serial No. E-338, dated March 3, 1947), by which the Board instituted a proceeding to determine whether Chicago and Southern's certificate authorizing service to Latin America should be suspended, Member Lee stated:

> "* * * A carrier's certificate is its guarantee of permanency but if after having been granted a certificate of convenience and necessity for a route the carrier must return and again prove convenience and necessity a second time, even before it has had an opportunity to operate the route, then the certificate will cease to be the substantial asset which it is now. Furthermore, the threat which is contained in this order to the New Orleans segment of this route, which is already in operation, is even more disturbing to the security of air carriers." (dissenting op., p. 10.)*

In a recent opinion (May, 1950) involving applications for exemptions from the requirements of obtaining certificates filed by a group of so-called irregular carriers, the Board, after referring to the economic difficulties which seriously threatened the growth and development of the air transportation industry in the period preceding enactment of the Act and the serious impairment of the credit position of the industry, stated:

> "In this setting, the Civil Aeronautics Act of 1938 was passed. *Its legislative history makes quite clear that the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development* and the elimination of the unrestricted and

* This investigation was terminated by the Board without action. Order, Serial No. E-1342, April 2, 1948.

> cut-throat competition which had brought the industry to its unhappy condition." (Opinion of May 25, 1950, Order Serial No. E-4240, p. 3; italics supplied.)

Thus the Congressional intent is clear: The certificate of public convenience and necessity was intended as an instrument for achieving security of route. Congress did not intend the Board to have the authority it now claims and which would destroy the very route stability which Congress intended the Act to provide. A route is anything but secure if the Board may simply suspend or realign it and substitute another carrier for the previously established, permanently authorized operator.

3. The power claimed by the Board would destroy the stability of the air transport industry.

The power to forcibly remake air routes, were it to exist for the purpose of implementing Board policies, would be a very drastic power, to say the least. Any assumption that the Board possesses such authority would mean that it could reshuffle the entire air transportation map because Section 401(h) applies to all air carriers. If the Board can require trunk line carriers to turn over portions of their routes to feeder carriers, it can require United to turn over a portion of its routes to Western, demand that American suspend its service between New York and Washington in favor of Eastern or, as in this case, substitute the services of a new carrier. The Board places no limit upon its power. What is more important, the Board claims the power which would permit it to revise the route pattern as its philosophy of public convenience and necessity changes from time to time. The impact of such a situation upon the air transport industry is obvious. No one could rely with any assurance upon the op-

erating authority currently possessed by any carrier. Prudent investors would be reluctant to risk their funds in such an industry and management could not act with any reliance upon the future. Management would no longer have the same incentive to develop and promote air transportation. The chaos existing prior to the Act would return.

Such results would be in direct contradiction to the fundamental objective of the Civil Aeronautics Act—stability. Vice Chairman Ryan in connection with this matter had occasion to point out:

> "* * * In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation, it is not surprising that Congress should impart to a certificate a certain stability by providing that it should be subject to revocation only for statutory cause *and not pursuant to a mere change of mind on the part of the Board.*" (Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity,* 15 Journal of Air Law and Commerce 377, at 385 (1948); italics added.)

The fact is that Congress never intended to give the Board the power to forcibly revamp the air routes of the country by suspensions.

The Civil Aeronautics Board, in its mail rate proceedings, has recognized the importance of stability in the air transport industry in order to create an economically sound industry. Although the Board has claimed the legal power to recapture excess mail payments made to carriers, it declined to exercise such power in *Pan American-Grace Airways, Mail Rates,* 3 C. A. B. 550, 565 (1942), because to assert such power under the circumstances—

> "* * * would impede long-range planning and would inject a measure of uncertainty into undertak-

> ings looking toward the expansion and development contemplated by the Civil Aeronautics Act. It would in all likelihood reduce managerial incentive to accomplish increased economies in operation. Management could hardly be expected to exert itself energetically to such purpose with the ever-present fear, however unfounded it might be, that money saved through increased economies would be taken away. It must be granted, too, that such a policy writes a questionmark across the carrier's financial statements which purport to reflect its true financial condition; for such statements, upon which investors may have relied, may subsequently be rendered misleading by a retroactive order of the Board. To the extent that such incidents create uncertainty as to the carrier's financial position they tend to impair its ability to attract capital, and a program of debt financing on terms unfavorable to the carrier would inevitably result."

Similarly, in *Transcontinental and Western Air, Inc.* v. *Civil Aeronautics Board,* 169 F. 2d 893 (1948), affirmed 336 U. S. 601, 69 S. Ct. 756, in which the Court decided that the Board did not possess the legal power to establish mail rates retroactively prior to the date of the institution of a proceeding therefor, the Court said (p. 896):

> "* * * If the Board could redetermine rates for a past period when the carrier has made less than an adequate profit, or no profit at all, it could do so when the carrier has made more than an adequate profit. The statute makes no differentiation. The financial confusion which would follow from the latter conclusion seems obvious. No rate order would be final. No dividend declaration would be secure. No large commitment would be conclusively feasible. No offering of securities would have a firm foundation. *We find no indication that Congress meant to create so great uncertainty. We would not read a statute as yielding such results unless the language was clear and certain.* We think that if Congress had intended to provide for recoupment of past losses, it would necessarily have

spelled out the terms of the proposal and not have left it to a clause which, if interpreted with that effect, would also have so obviously disastrous effects." (Italics supplied.)

The reasoning of the court applies fully to the issues here under discussion. If certificates were subject to involuntarily being transferred from one carrier to another at any time by the Board or were subject to being suspended so that the traffic could be carried by another carrier, the uncertainty and financial confusion which would result is all too apparent. Congress certainly did not intend to create such uncertainty and gave the Board no such power.

4. The power claimed by the Board is unprecedented.

The Board is claiming a power in this proceeding which is unprecedented in Federal transportation law and which exceeds the authority customarily conferred by Congress. The greatest extent to which Congress has gone in permitting the impairment of operating authority issued in connection with other types of transportation is to be found in the provisions of the Motor Carrier Act which provides as follows with respect to the suspension, change and revocation of certificates, permits or licenses:

"* * * Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. * * *" (Sec. 212(a), 49 U. S. C., Sec. 312(a)).

Under this provision impairment of a certificate may be effected only upon application of the holder or for failure to comply with the act, the orders or regulations of the Commission or the terms of the certificate, *i. e.,* for cause. An identical statutory provision was adopted by Congress in Part IV of the Interstate Commerce Act applicable to forwarders (49 U. S. C., Sec. 1010(f)). Congress made no provision for suspension, change or revocation of certificates issued to common carriers subject to Part I of the Interstate Commerce Act (49 U. S. C., Sec. 1(18) *et seq.*), to water carriers subject to Part III (49 U. S. C., Sec. 909 *et seq.*), or to telephone and telegraph companies coming under the Federal Communications Act (47 U. S. C. Sec. 214).*

Such legislative history as exists with respect to Section 401(h) of the Civil Aeronautics Act indicates that Congress did not intend to give the Board any unusual powers in relation to air transportation. Senator Truman, Chairman of the subcommittee of the Senate Interstate Commerce Committee, which considered the pending legislation, testified that the Bill which became the Civil Aeronautics Act did not suggest "any radical departure from tried and tested methods of regulation and administration." (Hearings on S. 2659, 75th Congress, Third Session, April 6-7, 1938, p. 2.) The Motor Carrier Act, adopted in 1935, was

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* Congress has delegated to the Federal Communications Commission powers of involuntary revocation and modification in the public interest with respect to radio licenses (47 U. S. C. Sec. 312(a)). However, Congress did not intend that such licenses be invested with the character of permanency since the duration of such licenses was limited to three-year periods. Moreover, that portion of the Federal Communications Act applicable to radio does not purport to exercise that complete economic control which exists in the case of other forms of transportation. As stated by the Court in *Pulitzer Publishing Co.* v. *F. C. C.*, 94 F. (2d) 249, 251 (C. C. A., D. C., 1937), the term public convenience, interest, or necessity as employed in the Federal Communications Act "should not be given such a broad meaning as is applied to it elsewhere in public utility legislation."

In addition to the statutory provisions cited above, see also: Federal Power Act, 16 U. S. C., Secs. 799, 820; Federal Alcohol Administration Act, 27 U. S. C., Secs. 204(g), 204(e).

in large part the model for the air legislation. Preliminary bills contained provisions with respect to suspension, change and revocation of certificates of public convenience and necessity which were *identical* in language with Section 212(a) of the Motor Carrier Act. (49 U. S. C., Sec. 312(a).) The subsequent changes were primarily in draftsmanship and were made without discussion either in committee or on the floor of Congress. Unexplained, these changes cannot be made the basis for any argument that Congress intended to grant the new and extensive powers which the Board proposes to exercise in this case. "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Company* v. *Whirls,* 331 U. S. 40, 61, 67 S. Ct. 982, 992 (1947).

The power which the Board here claims—to realign the routes of various carriers by substituting a wholly new carrier for an existing carrier—far transcends the ordinary powers conferred by Congress. It is a drastic power which the Board seeks and one which would have severe and lasting consequences upon the entire air transport industry. In view of its customary approach, it must be assumed that if Congress had intended the Board to have complete power to revise the route pattern from time to time, to substitute different carriers for existing services and to require existing carriers to turn over a portion of their routes and revenues to other carriers, Congress would have conferred such powers by the most careful and express language. Any other assumption is contrary to the very purpose of the Civil Aeronautics Act and imputes a lack of intelligence to this country's legislative body.

The history of legislation applicable to other forms of transportation reveals that Congress would have conferred such powers now sought by the Board only by specific and express language. Thus, when Congress, as part of the Transportation Act of 1920, authorized the Interstate Com-

merce Commission to prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems and provided that future consolidations be in accord with such plan (41 Stat. L. 481, 1920), it did so by carefully selected, specific language. In that instance, the Commission was only given authority to control *voluntary* consolidations in compliance with an over-all prescribed plan.* Obviously, if it had been intended that the Civil Aeronautics Board have a substantially greater power under the Civil Aeronautics Act, namely, power to effect route realignments by the involuntary suspension of permanent certificates of public convenience and necessity and by the substitution of the services of one carrier for another, it stands to reason that Congress would have made its intent clear by specific language. Congress granted no such power to the Board.

II.

THE BOARD HAS NO POWER TO EFFECT AN INDEFINITE OR PERMANENT SUSPENSION OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Despite the fact that the Board's order in the instant case provides for the suspension of Western for a fixed period, the proposed suspension is not, in fact, temporary, but is at least indefinite if not permanent and is, in effect, a revocation of Western's operating authority. It is a suspension in words only.

As has heretofore been pointed out, the Board's suspension of Western and the substitution of Bonanza in this proceeding and the suspensions of carriers in other proceedings is being accomplished pursuant to a comprehensive Board program. This policy was announced by the

* It should be noted that such plan was to be finally determined by the Commission only after notice and hearing.

Board in its Order of April 4, 1949 (Orders, Serial No. E-2680), referred to *ante,* p. 5, in which the Board said (p. 8):

> "From the information now before the Board we are of the general opinion that feeder service should seldom if ever be competitive. The traffic potential is so limited in most feeder territory that duplicate operations by two or more carriers can seldom if ever be economical. We have reached the conclusion that in general where a feeder carrier's route is duplicated by a trunkline carrier and such route is not necessary to the trunkline carrier's operation, then such route should be served by the feeder carrier alone. * * * Of course, these general objectives cannot be achieved immediately in many cases and may not be possible to fulfill in particular situations, but they represent salutary principles which are of importance in working out the appropriate relationship between our feeder carriers and the other certificated carriers."

This policy has not been announced as temporary or tentative but is co-extensive with the existence of feeder carriers. Obviously, if the policy accomplishes the results desired by the Board, it will be continued as long as feeders are in operation. In short, the suspensions here proposed by the Board contemplate the effectuation of a permanent Board policy. There is nothing "temporary" about the Board's position.

Every indication is present that operations by feeder carriers will be continued indefinitely. Although these carriers have been granted so-called temporary certificates with fixed expiration dates, such certificates are subject to renewal and have been successively extended by the Board in every instance but one. Pioneer Airlines, Inc., for example, which, as Essair, Inc., was issued a three-year certificate in November, 1943 (*Continental Airlines, Inc., et al., Texas Air Service,* 4 C. A. B. 478), has by suc-

based upon public convenience and necessity and the other upon misuse or violations of the Act. If it were intended by Congress that the cancellation or termination of a certificate could be accomplished based on a finding of the public convenience and necessity, it would have been easy and logical for the framers of the Act to include the word "revoke", which so concisely expresses such power, with the words "alter", "amend", "modify", or "suspend". This was done by Congress in Section 402(g) of the Act. In that section, Congress has provided for the cancellation or revocation of foreign air carrier permits upon the basis of the "public interest", which is also the prescribed standard for the alteration, modification, amendment or suspension of such permits. By providing that

> "Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, cancelled, or revoked by the Board whenever it finds such action to be in the public interest. * * *" (49 U. S. C. Sec. 482(g).),

it is clear that Congress did not attribute the same meaning to all of these words. The omission of similar language in Section 401(h) manifests a clear denial of the authority to revoke a permanent certificate upon the basis of public convenience and necessity. To hold that "suspension" and "revocation" in Section 401(h) have identical meaning and effect would ascribe a redundancy to the writers of this legislation which defies all reason. It is a well known principle of statutory construction that every portion of the Act should be read as to ascribe full meaning to it.

> "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

(2 Sutherland, *Statutory Construction,* Sec. 4705 (3rd Ed., 1943).)

There can be no question but that a permanent "suspension" constitutes an involuntary termination of authority which the Board cannot here bring about under Section 401 (h) of the Act. Neither non-user or any violations of the Act exist in this case. That an indefinite suspension also has the same effect as revocation was clearly recognized by Member Lee of the Board who, after pointing out in his opinion in *Chicago and Southern Suspension Investigation, supra,* that the Board there was confronted with two alternatives, temporary suspension and "continued" suspension, said in respect of the latter (dissenting op., p. 14):

> "The other alternative would be for the Board to suspend the routes indefinitely, *which means abandonment.* This, of course, raises the legal question as to what rights a certificate gives to a carrier and as to what powers the Board may have to force abandonment of a route through its power of suspension. The Act gives the Board power to revoke a certificate only for failure by a carrier to comply with the provisions of the Act or with the regulations established thereunder, and even then the Board must notify the carrier of its short-comings and request compliance. There would be a legal question as to how long the Board could suspend a certificate unless the carrier agreed to the suspension. The legal question is presented as to whether the Board could effect what would amount to revocation of a certificate through its power to suspend. I do not propose to go into this question now; however, it is presented in this case as an alternative which may face the Board as a result of the investigation, and I merely suggest that if the Board does not have the power to continue the suspension of a certificate indefinitely it may find itself in an embarrassing position if it should decide that the economic conditions require suspension of the cer-

> tificate, and if those conditions continued indefinitely, in the judgment of the Board, and the carrier should insist that it wished to inaugurate service on its route." (Italics supplied.)

Likewise, Vice-Chairman Ryan referring to the same proceeding stated:

> "Any suspension which the Board might order as a result of such investigation must, in my view of the law, be not as a device for accomplishing the permanent cancellation of the service but as a means of accomplishing a temporary postponement of the operation until favorable economic conditions offer lower costs and higher load factors." (Order Serial No. E-337, dated March 3, 1947.)

That Western's suspension in the instant case is at least indefinite is plainly indicated by the language of the new certificate of public convenience and necessity issued to it as a result of the Board's order which is before this Court for review. This certificate now provides that:

> "(3) The holder's authority to serve El Centro, Calif., and Yuma, Ariz., shall be suspended up to and including December 31, 1952, or until the date upon which the Board shall have finally determined a timely filed application by Bonanza Airlines, Inc., for renewal of Segment No. 2 of route No. 105, whichever shall last occur: * * *."

What plainer statement could there be of the Board's intention: In so many words the Board has stated that the duration of Western's suspension shall be contingent upon the further renewal of Bonanza. If the Board had any intention of terminating Western's "suspension" on December 31, 1952, or shortly thereafter, there would be no need to make the termination of such suspension depend upon the date of the Board's decision involving Bonanza's further renewal. Obviously, the Board must contemplate that if Bonanza's authority is extended for a further period, Western's authority to serve El

Centro and Yuma will likewise be further "suspended." Otherwise needless duplication of service at El Centro and Yuma would again result. Successive renewals of Bonanza will call for successive "suspensions" of Western. Such action is not a temporary postponement or deferral of service which would constitute a suspension of service within the meaning of Section 401(h) of the Act, but is an indefinite termination of service equivalent to a revocation and is beyond the powers of the Board. An explanation of the language inserted in Western's certificate was stated by the Board in its opinion as follows (p. 15):

> "We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, *i. e.*, on December 31, 1952, when Bonanza's certificate formally expires. However, it is possible that Bonanza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. * * *"

This explanation does not deny the contemplated indefiniteness of Western's suspension but confirms it.*

The Board cannot do indirectly what it has no power to do directly. The Board cannot by means of a claimed power of suspension effect a revocation of a certificate of public convenience and necessity. In *United States* v. *Seatrain Lines, supra,* the Interstate Commerce Com-

* By its Order Serial No. E-6041, dated January 17, 1952, the Board instituted an investigation to determine whether the routes of Bonanza as extended should be consolidated or otherwise integrated with those of Southwest Airways Company, another feeder carrier. Such action clearly indicates that the Board has no intention to terminate on December 31, 1952, or shortly thereafter, the feeder services to Yuma and El Centro which it has authorized Bonanza to perform.

mission contended that while the Interstate Commerce Act did not specifically empower it to revoke certificates of water carriers, the Commission could nonetheless accomplish the same result under its statutory authority to fix "terms, conditions and limitations" upon certificates. The Supreme Court, after noting that the purpose of the proceeding apparently was to execute a new policy of the Commission, rejected the foregoing argument and held (pp. 432-433):

> "* * * The certificate, when finally granted, and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate. * * *"

The reasoning of that decision is applicable here. The Board's authority to effect revocations is set forth in the Act and it cannot force a revocation except upon the conditions prescribed. Those conditions, as shown, do not exist and any attempt to do indirectly what cannot be done directly is beyond the Congressional delegation of power to the Board.

The Board has contended in the *Caribbean Area Case*, 9 C. A. B. 534 (1948),* that it has the power to eliminate points from a certificate or to impose a restriction prohibiting service previously authorized by virtue of the policy section of the Civil Aeronautics Act, which includes in the definition of public convenience and necessity and public interest the "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." It is submitted that such position is untenable.

* In this case, the Board amended the terms, conditions and limitations of the certificate held by Pan American Airways, Inc., to restrict the operation of local flights by that carrier between St. Thomas, V. I., and San Juan, P. R. It did not eliminate service to those points.

The policy of Congress must be determined by the Act as a whole and in light of the intention of Congress expressed in the legislative history and not by Section 2 alone, or any part thereof.

Moreover, it must be assumed that Congress intended the policy expressed in Section 2 to be carried out within the framework of the powers expressly granted to the Civil Aeronautics Board. As shown above, Congress did not grant to the Board power to realign the air route pattern, to modify the system with each change in policy which might result from changing membership on the Board, to substitute the services of one carrier for those of another or to indefinitely suspend a carrier's certificate based upon public convenience and necessity. The policy section of the Act does not enlarge or confer powers not otherwise provided for in the Act. *Yazoo & M. V. R. Co.* v. *Thomas,* 132 U. S. 174, 10 S. Ct. 68, 73 (1889); *In re American States Public Service Company,* 12 F. Supp. 667, 681 (D. C. Md., 1935). This is particularly true where, as here, Section 2 is no more than a definition of the factors to be considered in interpreting the terms public convenience and necessity and public interest used elsewhere in the Act.

Even assuming Section 2 represents the general policy to be followed by the Board in the administration of the Civil Aeronautics Act, the encouragement and development of air transportation is not the sole factor which Congress has said should guide the Board. The Board is also enjoined to regulate air transportation in such manner as to foster sound economic conditions in such transportation. It is obvious that stability of operating authority is essential to this end as well as to the proper encouragement and development of air transportation. The legal power to destroy such stability would be contrary to the very policy established by Congress.

III.

THE BOARD HAS NO POWER UNDER THE ACT TO SUSPEND THE SERVICES OF A PERMANENTLY CERTIFICATED CARRIER AND SUBSTITUTE THOSE OF ANOTHER.

Such power as the Board may have to suspend a carrier's operating authority under Section 401(h) of the Act must be predicated upon the finding that the public convenience and necessity no longer require the air service being provided. Similarly, any extension of service must likewise be based upon the finding of public convenience and necessity for such service. United submits that the Board cannot, without abusing its administrative powers, find that the public convenience and necessity do not require air service and at the same time justify the continuation or substitution of another carrier's service on the basis of that self-same public convenience and necessity. No rule of construction permits the employment of any such legal gymnastics productive of diametrically opposite results in the application of the same provisions of a key statute.

In the instant case, the Board has extended Bonanza from Phoenix to Los Angeles via San Diego and various other intermediate points, including Yuma and El Centro, on the finding that public convenience and necessity require such air service. With respect to the traffic needs of Yuma and El Centro, the Board found (op., p. 3):

> "There is no question that for the cities east of San Diego, such as El Centro, Yuma, Ajo and Blythe, Los Angeles is the western point of greatest traffic attraction."

This is essentially the air service which was being provided for El Centro and Yuma by Western. The Examiner found, and his findings were adopted by the Board, that

during the period February through September, 1950, 83 percent of the traffic to and from El Centro travelled to or from San Diego, Los Angeles and San Francisco, points served by Western; and 90 percent of Yuma's traffic were to and from these points. In view of the above findings, the Board could not and did not find that the public convenience and necessity do not require air service between Yuma and El Centro, on the one hand, and San Diego and Los Angeles, on the other, as provided by Western so as to require Western's suspension. Although the Board found that Western could provide service to Phoenix at less cost to the government and could offer more through service to the communities on the route than any of the other applicants, it concluded that it should nevertheless adhere to its policy of "favoring the award of local service routes to local service operators." The Board also found that the traffic volumes on the proposed route would not support the services of two carriers serving such points as Yuma and El Centro and, accordingly, "suspended" Western's operations to Yuma and El Centro, substituting therefor the operations of Bonanza. The Board's power to suspend does not exist for such purposes. The power of suspension under Section 401(h) is not a device by which the Board can eliminate a permanently certificated carrier as long as the public convenience and necessity require air transportation between the points served by that carrier.

Nor can the Board rely on any contention in this proceeding that excessive competition exists insofar as service to Yuma and El Centro is concerned and that the public convenience and necessity do not require the services of two carriers. The competition which is claimed to be excessive has been created in this very proceeding. To create competition and then in the same opinion to hold that such competition is excessive and requires the suspension of the

existing carrier's services goes far beyond the authority delegated by Congress to the Civil Aeronautics Board.

The Board's suspension of Western is allegedly designed to effect an improvement in the economic position of Bonanza, a feeder carrier. However, the Civil Aeronautics Act does not expressly, or by implication, confer upon the Board the power to substitute the services of one carrier for another or to require one carrier to give up its revenues to a carrier in a less fortunate financial position. Under the Act, the Board is authorized to issue two types of certificates, one carrying a title of temporary and the other not carrying such designation. The latter type of certificate, while not being specifically designated as permanent, was intended to be so by Congress and has been acted upon as such by Congress, the public and the carriers. Presumably, such differentiation in the types of certificates to be authorized by the Board was intended to enable it to terminate the authorizations of carriers having such temporary certificates if required in the public interest. The Board has issued certificates of the temporary type to the feeder carriers and the services of these carriers may be properly terminated under the terms of such certificates if the feeder experiment has resulted in uneconomic operations. The Board has other alternatives available to it but they do not include the power to terminate the operations of permanently certificated carriers in favor of such feeder carriers. To the extent that the Board's feeder experiment requires financial support and to the extent that such operations are required by the public convenience and necessity, the Board has it in its power to provide such support through mail compensation under Section 406 of the Civil Aeronautics Act, which is the remedy which it should pursue instead of depriving other carriers of their revenues.

The standard of public convenience and necessity ap-

plicable to the Board's suspension power in Section 401(h) of the Act indicates the purpose and limits of such power. The power to suspend is given full purpose and meaning if it is interpreted to confer upon the Board the means of relieving an air carrier from serving points or routes where traffic volumes may have declined to such a point as to no longer justify air service but where future developments may again require the resumption of air service.* The common and ordinary meaning of the word suspend which is to withdraw *temporarily* or to stop *temporarily* (page 24, *supra*) carries with it an "expectation" of resumption of service by the carrier which has been suspended when such service is again required. As stated by Member Ryan, the power of suspension under Section 401(h) is not "a device for accomplishing the permanent cancellation of the certificate but only a means of accomplishing *the temporary postponement* of the *operation until favorable economic conditions should offer lower costs and higher load factors.*" (Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity, supra;* italics supplied.) The reasonable interpretation to be accorded to the Board's power to suspend under Section 401(h) does not embrace the power of terminating air service by one carrier and substituting the services of another carrier therefor. Authority to make substitutions is nowhere granted in the Civil Aeronautics Act. Had Congress intended to provide such authority it could and would have said so expressly.

The Board's Order of January 17, 1952 is void because it goes beyond the powers conferred upon the Board by the Civil Aeronautics Act of 1938, as amended. The Board has neither expressly nor by implication the authority to suspend Western's permanent certificate of public convenience and necessity for the purpose of realigning the

* Section 401(k) provides for complete termination of service for such reasons upon petition by the carrier for abandonment.

domestic air transportation pattern. It does not have the power to indefinitely or permanently "suspend" Western's permanent certificate of public convenience and necessity, and it does not have the power to substitute the services of a temporarily certificated carrier for those of a permanently certificated carrier. The Board's Order of January 17, 1952 should, therefore, be set aside.

Respectfully submitted,

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Dated: March 10, 1952.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing Brief upon Petitioner, Western Air Lines, Inc., and upon Respondent, Civil Aeronautics Board, by mailing to their respective attorney of record a copy thereof, properly addressed, with postage prepaid.

Dated at Chicago, Illinois, this 10th day of March, 1952.

JOHN T. LORCH,
Attorney for United Air Lines, Inc.

NO. 13245

In the United States Court of Appeals for the Ninth Circuit

WESTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

BRIEF FOR RESPONDENT

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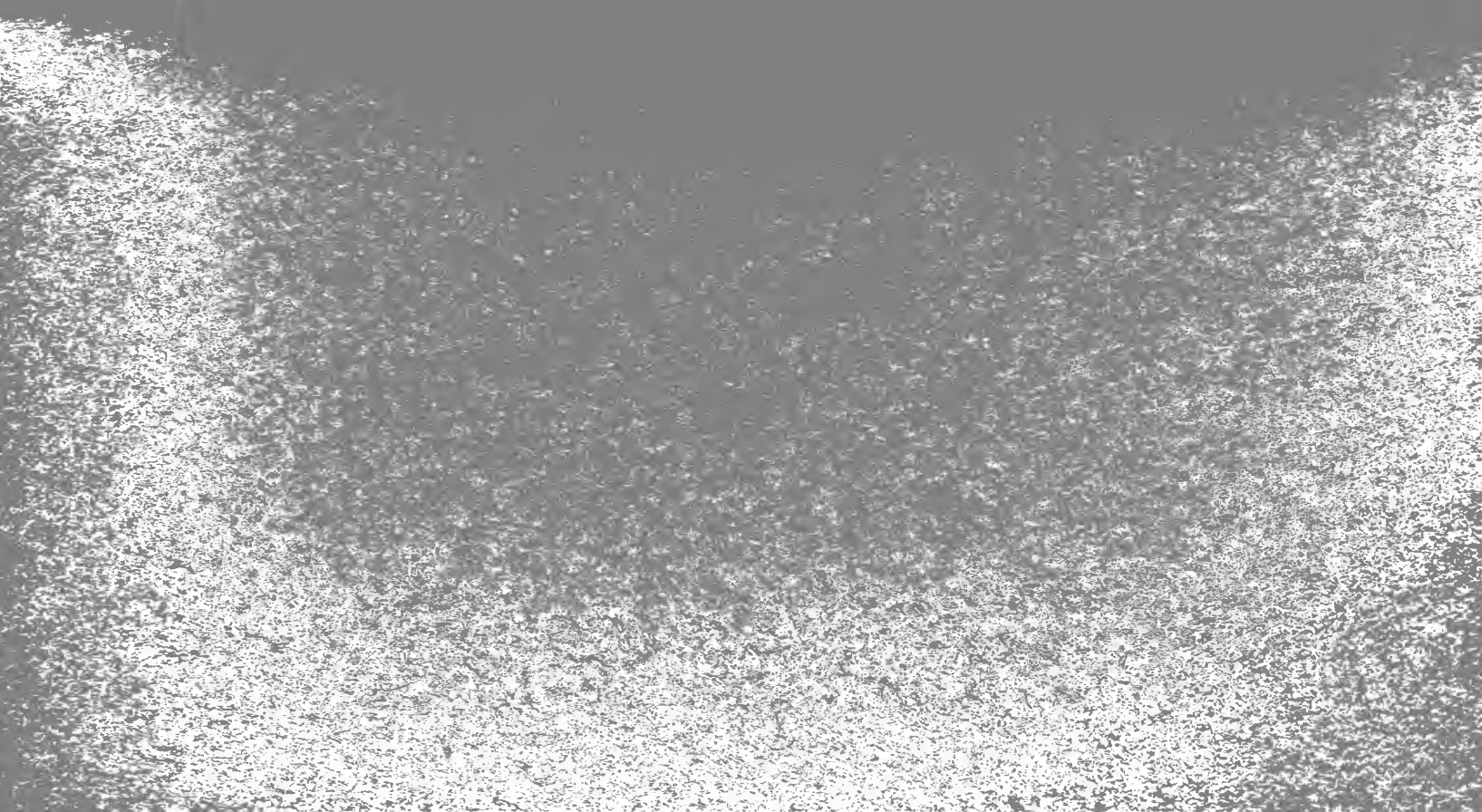

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WESTERN AIR LINES, INC., *Petitioner,*

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CIVIL AERONAUTICS BOARD, *Respondent.*

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board (hereafter called Board) to issue the order under review rests on sections 2, 205, and 401 of the Civil Aeronautics Act of 1938 (52 Stat. 993, as amended, 49 U.S.C. 401 *et seq.*) and was invoked by various applications filed and orders issued in a consolidated proceeding before the Board, known as the *Reopened Additional California-Nevada Service Case,* Dockets Nos. 2019 *et al.* The jurisdiction of this Court to review such order rests on section 1006 of the Civil Aeronautics Act (52 Stat. 1024, 49 U.S.C. 646) and was invoked by a petition for review filed by Western Air Lines, Inc. (hereinafter called Western) on January 28, 1952.

COUNTER STATEMENT OF THE CASE

Nature of the Case

Petitioner Western herein seeks review of Board Order Serial No. E-6040, dated January 17, 1952, which provided, among other things,[1] that (1) a temporary certificate of public convenience and necessity should be issued to intervener Bonanza Air Lines, Inc. (hereinafter called Bonanza) authorizing local air service between Los Angeles, San Diego and Phoenix via various intermediate points, including El Centro and Yuma, and (2) that Western's existing authority to serve El Centro and Yuma should be suspended up to and including December 31, 1952, the expiration date of Bonanza's temporary certificate.[2]

Petitioner sought a stay of the Board's order pending review. On February 18, 1952, this Court entered an order staying the Board's order

> pending a determination by the Court of the legal issue of whether respondent had statutory power, after notice and hearing, to suspend petitioner's authority to serve El Centro, California and

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[1] The order also provided for the suspension of the authorization of Frontier Airlines, Inc. to operate between Yuma and Phoenix, an action not here under review.

[2] The order also provided that if pursuant to section 9(b) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1008), Bonanza's authority is extended beyond such date by the filing of a timely application for renewal, the suspension of Western's authority will continue until disposition of Bonanza's application. Bonanza is a local air service carrier with a route running between Reno, Nevada, and Phoenix. For a map of the air routes involved, see Western's brief preceding p. 1.

> Yuma, Arizona upon finding that the public convenience and necessity no longer required service to such points by petitioner but rather required service by the intervener.

The Court directed that the parties file briefs directed solely to the legal issue thus framed. Accordingly, the sufficiency of the evidence to support the Board's findings is not in issue. We believe, however, that it will be helpful to the Court to describe the background of the Board's proceedings in this case and the factual setting which gave rise to the order which is challenged here.[3]

The Procedings Before the Board

The order under review was issued in a consolidated proceeding involving the determination of the local air service needs of the Los Angeles-San Diego-Phoenix area and the route pattern best adapted to meet those needs, a problem which had been before the Board for some time in various prior proceedings.[4] The consolidated proceeding involved (1) proceedings under an order of the Board directing Western to show cause why its service at San Bernardino, Palm Springs, El Centro and Yuma should not be suspended, and direct-

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[3] Western's Statement (Br. 2-12) is largely devoted to a historical discussion of the development of the air industry generally and of feeder carriers in particular.

[4] The history of this previous consideration is set forth at pages 1-3 of the Appendix to the Board's opinion in the *Reopened Additional California-Nevada Service Case,* (Pet. Appendix 22-26).

ing Arizona Airways, Inc.[5] to show cause why its authorization to provide service between Phoenix and Yuma should not be suspended; and (2) consideration of applications by Bonanza, Southwest, and Western for certificates to provide Los Angeles-San Diego-Phoenix service.

Western at that time held a certificate authorizing operations over a circular route extending from San Diego to Los Angeles via El Centro, Yuma, Palm Springs, San Bernardino and Long Beach (Route No. 13).[6] However, Western had operated this route largely as if it were two separate routes, conducting operations between Los Angeles-Palm Springs, and between Los Angeles and Yuma via San Diego and El Centro, usually on flights originating north of Los Angeles on other routes operated by Western.

Western began service to El Centro in January, 1946, with two round trips daily to Los Angeles, which was reduced a year later to one round trip daily and shortly thereafter to three round trips per week. Service was inaugurated to Yuma in May, 1947, with only three

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[5] Subsequently merged into Frontier Airlines, Inc. Frontier is a local air service carrier whose operations extend north and south through the States of Arizona, New Mexico, Colorado, Utah, and Wyoming. Its routes also touch points in Western Texas and Southern Montana. One of its predecessors, Arizona Airways, was certificated to operate between Phoenix and Yuma. However, approval of the merger of Arizona and Frontier was granted by the Board only on condition that operations not be commenced over the Phoenix-Yuma segment. (Pet. Appendix 26).

[6] Route No. 13 also extended from Los Angeles to Salt Lake City via various intermediate points. Western was authorized to serve El Centro on Route No. 13 in 1943, and Yuma in 1946.

round trips a week. Service to El Centro and Yuma was increased from a thrice weekly frequency to twice daily only after Western was placed on notice that the Board might suspend its authorization to serve these points and thus adversely affect Western's plan for extension of its route to Phoenix.[7] (Pet. Appendix 17.)

In July, 1948, Western filed an application with the Board for approval of an agrement with Arizona Airways, Inc. to transfer the San Diego-El Centro-Yuma segment to the latter air carrier, and in March, 1949, filed an application to suspend its service over the segment pending inauguration of service by Arizona Airways between Yuma and Phoenix. These applications were withdrawn in July, 1949, when Western filed an application to extend Route No. 13 from Yuma to Phoenix.[8]

After full public hearings in the consolidated proceedings, the Examiner on August 17, 1951, issued his report recommending, *inter alia,* that local air service be provided between San Diego and Phoenix via El Centro, Yuma, and Ajo, and that Western be selected as the carrier to provide such service. Exceptions thereto with supporting briefs were filed and oral argument thereon held before the Board.

On January 17, 1952, the Board issued its opinion

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[7] The Examiner found that the type of service Western provided the cities during 1947-1949 clearly did not meet the minimum requirements for adequate service.

[8] The history of Western's service to El Centro and Yuma is set forth in detail at pp. 22-24 of the Appendix to the Board's opinion (Pet. Appendix 56-59).

and order. The Board found that the public convenience and necessity required local air service between Los Angeles, San Diego and Phoenix by the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, Ajo and Blythe. The Board further found that there is insufficient traffic potential at any of the points to justify service by more than a single carrier. In considering whether Western, a trunkline carrier, or one of the two local service applicants (Bonanza and Southwest) should be selected, the Board reviewed its established policy of favoring the award of local air service routes to local air service operators rather than trunkline air carriers (Pet. Appendix 12-13).[9] The Board concluded that there was no basis for any change of this policy in the present circumstances. Moreover, the Board declared that "the history of Western's service to El Centro and Yuma is such as to warrant an adverse conclusion as to the Western's willingness to operate a truly local service route" (Pet. Appendix 12).

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[9] The Board has heretofore stated with respect to local or "feeder" services, "we do not believe that in the present development and experimental stage of this type of service it should be entrusted to a carrier whose primary objectives are in providing trunkline service of a long-haul nature. In view of the limited traffic potentialities of the smaller cities to be served, an unusual effort will be required to develop the maximum traffic. Greater effort and the exercise of managerial ingenuity may be expected from an independent local operator whose continuation in the air transportation business will be dependent upon the successful development of traffic at these cities and the operation on an economical basis." *West Coast Case,* 6 C.A.B. 961, 981 (1946). cf. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 184 F. 2d 545 (C.A. 9, 1950).

The Board pointed out that for Bonanza the points of El Centro and Yuma represent important traffic centers whereas to Western the record indicates that they were and are merely secondary points to which adequate service will be rendered only if some other purpose of the carrier is being served.[10] It concluded that the low priority accorded the needs of El Centro and Yuma by Western in the past stemmed from the fundamental economic fact that a business will ordinarily seek first to exploit areas of greater potential profit and that conversely in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. The Board declared that these factors supported the conclusion that El Centro and Yuma will, in the long run be better served by a local air carrier than by a trunk (Pet. Appendix 17).

The Board noted that even if Western could, as it contended, operate the required local air service at a lower cost to the government than either Bonanza or Southwest, this factor could not be decisive. For, if relative costs were the dominant criteria for the award of a new local air service, it would put an end to the policy of favoring independent local service carriers to operate local service routes (Pet. Appendix 9-13).[11]

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[10] The Examiner had found that this primary interest was an unrestricted San Diego-Phoenix route (Pet. Appendix 58).

[11] In addition, the Board found in the course of comparing Bonanza and Southwest that the award of the additional route miles to Bonanza would tend to lower its system unit operating costs and thus, to improve that air carrier's economic position. The government would in turn realize a saving in mail pay support for Bonanza's current route. (Pet. Appendix 15 and 16)

Similarly, the Board declined to regard as controlling the conclusion that Western could offer more through service to the communities on the local service route than either of the other applicants. Here too, it pointed out that a trunkline carrier applicant would almost always succeed to a local service route rather than an independent local service carrier if this criterion were adopted. (Pet. Appendix 13).

The Board concluded that in the light of its policies with respect to the operation of local air service routes, and with relation to its responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, a local service air carrier should be selected to operate the required local air service and Bonanza should be selected in preference to Southwest.[12]

STATUTES AND REGULATIONS INVOLVED

Western has either quoted in its brief or set forth as an Appendix thereto a majority of the provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.* (hereinafter sometimes referred to as the Act), to which references are made herein. Other provisions of the Civil Aeronautics Act are cited or quoted in their appropriate place in the text of this brief.

QUESTIONS PRESENTED

Section 401(h) of the Civil Aeronautics Act gives the Board authority upon its own initiative and after

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[12] The Board made comparative findings between Bonanza and Southwest (Pet. Appendix 13-16), but the selection of Bonanza over Southwest is not at issue.

notice and hearing to "alter, amend, modify, or suspend" a certificate of public convenience and necessity "in whole or in part, if the public convenience and necessity so require".

The questions presented are:

1. Whether the Board had authority under section 401(h) to suspend Western's certificate for Route No. 13 in part, and for a temporary period, on findings that (a) the public convenience and necessity required a local type air service at the suspended points (b) the public convenience and necessity required such service to be rendered by an independent local service carrier, Bonanza, rather than by the trunkline carrier Western, and (c) the traffic available at the suspended points would not support both a trunkline service by Western and a local air service by Bonanza.

2. Whether an objection to an order of the Board may be considered by the Court where it was not urged before the Board.

3. If the answer to the above question is in the affirmative, the further question is presented whether the suspension of Western's authority to serve El Centro and Yuma involves a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

I.

Section 401(h) of the Civil Aeronautics Act gives the Board authority upon its own initiative and after

notice and hearing to (1) alter, amend, modify, or suspend a certificate, in whole or in part, if the public convenience and necessity so require, or (2) revoke a certificate in whole or in part for intentional failure to comply with any provision of Title IV of the Civil Aeronautics Act (Air Carrier Economic Regulation) or any order, rule, or regulation issued thereunder or any term, condition, or limitation of such certificate. The choice before the Board in this proceeding was not between "suspension" and "revocation", but between "suspension" and "alteration, amendment or modification". The latter power to alter, amend, or modify can be exercised to discontinue permanently an existing service where it does not work a basic transformation of the route. Suspension is a narrower power in the sense that no permanent change in the certificate authority is effected. Even an indefinite suspension may be ended at any time, and the certificate authority revived. This case was an appropriate one for a suspension, rather than an alteration of Western's certificate insofar as it authorizes service to El Centro and Yuma, because of the temporary nature of the Board's certification of Bonanza.

II.

The Board's action in temporarily suspending Western's service at El Centro and Yuma and certificating Bonanza was a lawful exercise of the Board's authority.

A. The Board's action in suspending Western's service was not a revocation of Western's certificate in dis-

guise. The Board did not use suspension as a device to accomplish revocation. The suspension was for a temporary period and any extension is speculative. Even if the suspension were for an indefinite period, it would constitute a lawful exercise of the Board's suspension power, which does not depend upon the length of a suspension, but upon the continued existence of the factors of public convenience and necessity which bring it into play. Even if Western's contention that the suspension of the particular operating rights involved is intended to be permanent were correct, the effect would be an alteration or modification of Western's certificate, not a revocation.

B. The Board's action in suspending Western and certificating Bonanza met the standard of public convenience and necessity imposed by section 401. This standard is defined in section 2 of the Act, and looks toward the development of a sound air transport system properly adapted to the needs of the commerce of the United States, the Postal Service and the national defense. The Board in applying the standard of public convenience and necessity in this case found a need for a local type air service between Poenix and the West Coast serving El Centro and Yuma, and found that Bonanza should supply the service. This was a proper application of the standard of public convenience and necessity. Consequently, the Board under section 401 could properly suspend Western and certificate Bonanza.

Western argues against this natural and logical application of section 401 by contending that it would

thwart the purpose of the Civil Aeronautics Act to insure stability of air transportation through permanency of certificates, and that suspension must be limited to cases where there is no need for any service. Such a narrow interpretation would improperly limit the Board in applying the standard of public convenience and necessity under section 401. The power to alter is essential to proper regulation, especially in a subsidized industry, and contributes to the development of a sound air transport system since service not required by the public convenience and necessity should be discontinued, and service so required should be instituted. Where, as here, no ultimate decisions have been reached, suspension rather than alteration was appropriate.

Western's contention also is predicated upon an erroneous assumption that the power asserted by the Board will be used arbitrarily to upset the stability of airline operations. Application of the standard of public convenience and necessity by the Board can never be arbitrary and is always subject to court review.

III.

The suspension of Western's authority to serve El Centro and Yuma is not subject to attack on constitutional grounds. Western did not raise a constitutional issue before the Board, and is therefore barred by section 1006(e) of the Civil Aeronautics Act from raising it on judicial review. In any event, the suspension of part of Western's certificate was not a "taking" of Western's property. Section 401(j) of the

Civil Aeronautics Act provides that no certificate shall confer any property right in the use of air space. Moreover, Western took its certificate subject to the power reserved to the Board in section 401(h) of the Act to alter or suspend that right. Also, there has been no "taking" for public use, but merely the exercise of a regulatory power over interstate commerce. Finally, Western has not established and cannot establish that it will incur any loss whatsoever in any of the three categories it lists.

ARGUMENT

I.

The Civil Aeronautics Act Gives the Board Authority Upon Its Own Initiative and After Notice and Hearing, to Discontinue Existing Carrier Service Where the Public Convenience and Necessity So Require

Section 401(h) of the Civil Aeronautics Act gives the Board authority, upon its own initiative, and after notice and hearing, to discontinue existing carrier service in whole or in part. This section reads as follows:

> *Authority to Modify, Suspend, or Revoke*
>
> The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate

> shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

The statute thus provides for two separate areas of Board authority with respect to existing certificates. One area of authority is the power to revoke existing certificates, in whole or in part, for violations of the Act, or Board regulations or orders. The other area of Board authority is the power to alter, amend, modify, or suspend existing certificates, in whole or in part, where the public convenience and necessity so require.[13]

The Board in various proceedings has drawn the line of demarcation between these areas of authority and their appropriate uses. Revocation is a permanent withdrawal of a certificate right by the Board. It is a punitive action for wilful violations, and the Board

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[13] Western's brief treats section 401(h) as if it provided only for suspension or revocation of existing certificates. This treatment is necessary to its erroneous contention that the Board, under the guise of suspension, has revoked its certificate to serve El Centro and Yuma.

was given power to take such action as an added sanction in the enforcement of the Act.[14] The Board has never had occasion to impose such a drastic sanction, particularly since other sanctions are available to the Board which, if imposed, do not result in the termination, through revocation of the certificate, of a service required by the public convenience and necessity.

On the other hand, the power given to the Board by section 401(h) of the Civil Aeronautics Act to alter, amend, modify, or suspend existing certificates is not punitive in character, but depends for its exercise upon the requirements of the public convenience and necessity, the same standard under which the Board may grant certificate rights under section 401(d) of the Act, and this standard is spelled out for both sections 401(d) and 401(h) in section 2.[15]

The power to alter, amend, or modify contemplates permanent changes in existing certificates either by way of a grant of authority to serve an additional point or points, or by changing the terms of the certificate so as to eliminate or restrict authority to serve a point or points.[16] The Board has held that such changes must be of a nature which do not work a basic transformation in the character of a route.[17] The use of this

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[14] *All American Airways Suspension Case,* 10 C.A.B. 24 (1949).

[15] The Board may revoke for cause even though the public convenience and necessity require the service. *All American Airways Suspension Case, supra.*

[16] *Panagra Terminal Investigation,* 4 C.A.B. 670 (1944); *Carribbean Area Case,* 9 C.A.B. 534 (1948).

[17] *Ibid.*

power becomes appropriate where there are present factors of the public convenience and necessity which require a permanent change in the authorizations of an existing certificate. For example, in the *Carribbean Area Case, supra,* the Board, on petition of Caribbean Atlantic Airlines, Inc., restricted the existing certificate right of Pan American World Airways, Inc., to serve St. Thomas to through flights in order to protect the local traffic of Caribbean-Atlantic which had been established as a local air carrier to serve the United States Caribbean possessions.[18]

The power to suspend depends upon the same factors of the public convenience and necessity as does the power to alter, amend, or modify. However, its appropriate use is in a situation where a permanent change in a certificate is not required. It connotes the continued legal existence of the certificate right and the possibility that the public convenience and necessity factors giving rise to the suspension may come to an end so that the service can be restored. The exercise of the power of suspension has been held to be appropriate in a number of cases decided by the Board.[19]

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[18] The Board expressed the opinion that the power to alter, amend, or modify a certificate, carries with it the right to impair the authority under such certificate either by completely eliminating a point or by imposing a condition which results in restricting the service that may be rendered (p. 546).

[19] *All American Airways, Suspension case,* 10 C.A.B. 24; *Wisconsin Central Renewal Case,* decided December 13, 1951, Order Serial No. E-5951; *Pioneer Certificate Renewal Case,* decided September 1, 1950, Order Serial No. E-4585; *Southwest Renewal-*

Section 401(h) thus provides a harmonious scheme of regulation with respect to existing certificate rights which affords those rights all the protection needed to provide a reasonable degree of security for the development of air transportation while at the same time recognizing the obvious need for some flexibility in the route pattern of an industry characterized by continuous and relatively rapid change.

Western in its brief has conceded, as it apparently felt it must in the face of the plain words of section 401(h), that the Board has the statutory power to suspend a certificate upon its own initiative (Pet. Br. 35) and that such suspension may be for an indefinite period (Pet. Br. 36). Once it is conceded that the power to suspend exists at all, we submit that it must also be conceded that the extent of the power cannot be limited or defined by the wishes of Western or even of the Board, but by the statute itself. The statute permits the Board to suspend only where the public convenience and necessity so require. This is the true and only test.

The real question is, therefore, did the Board in this case exercise its power to suspend in accordance with the statutory standard, i.e., the requirements of public convenience and necessity. This question is considered in Point II.

United Suspension Case, decided January 29, 1952, Order Serial No. E-6063; *North Central Route Investigation Case,* decided December 13, 1951, Order Serial No. E-5952; *Frontier Renewal Case,* decided September 14, 1951, Order Serial No. E-5702.

II.

The Board's Action in Suspending Western's Certificate to Serve El Centro and Yuma for a Temporary Period and Certificating Bonanza to Serve Such Points During That Period Represented a Lawful Exercise of the Board's Authority Under Section 401 of the Civil Aeronautics Act.

A. The Board's Action Was a Suspension and Not a Revocation of Western's Certificate Authority.

Western relies in large measure on the contention that the Board's action in suspending Western's service at El Centro and Yuma was in fact a revocation of Western's authority to serve such points and that there has been no default calling into play the Board's power to revoke. This contention is premised on the conclusion that facts show the local air service carriers are here to stay so that it can be anticipated the suspension will be continued indefinitely or made permanent and that the Board has carefully used suspension as a device to accomplish a revocation it could not otherwise have ordered.

The use by the Board of the suspension power in discontinuing Western's authority to serve El Centro and Yuma was not, as Western's brief implies, a device by the Board to avoid the use of the revocation power for which there was no statutory occasion. The alternatives before the Board were not "suspension" or "revocation" of part of Western's certificate.[20] The alternatives were "suspension" of such certificate on the one hand, or on the other hand the "alteration,

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[20] The distinction between a suspension power and a revocation or cancellation power has been recognized by the Courts. *Martinka* v. *Hoffmann,* 214 Minn. 346, 9 N.W. 2d 13, 17 (1943); *Elliott* v. *Farmers Mutual Fire Ins. Ass'n. of Black Hawk County,* 233 Iowa 766, 10 N.W. 2d 556 (1943).

amendment, or modification'' of such certificate, both of which rest upon the requirements of the public convenience and necessity. By use of the latter the Board could have ended Western's authority to serve El Centro and Yuma on a permanent basis just as effectively as if such authority were revoked. In an appropriate situation in which the public convenience and necessity required such a permanent alteration of Western's certificate for Route No. 13, this action could be taken, as it clearly would not result in a basic transformation of that route.[21] However, the situation was not appropriate for the permanent alteration of Western's certificate. The needed local air service between Phoenix and the West Coast via El Centro and Yuma was to be provided by a carrier with a temporary certificate (as are the certificates of all local air service carriers). The public conveneince and necessity did not therefore require the permanent discontinuance of Western service by way of the alteration of Western's certificate. The Board took the only appropriate course under section 401(h).[22]

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[21] El Centro and Yuma are only two out of ten points on the route which extends all the way to Salt Lake City. In addition, the two points are but a minor part of the Western-Inland Airlines system of total operations running between Seattle and San Diego and between Los Angeles and Lethbridge, Canada and Minneapolis. (Western owns approximately 99% of Inland's stock and, pursuant to Board approval, proposes to merge the two carriers on April 10, 1952).

[22] An alteration or modification of Western's certificate by the elimination of El Centro and Yuma therefrom would have permanently restricted Western from serving those points even though the Board might subsequently not renew Bonanza's temporary certificate or the factors supporting the Board action might come to an end.

To support its position that the Board has in effect revoked a part of its certificate, Western has been forced to fall back upon speculation as to what future Board action will be. Such speculation cannot serve as a basis for rendering invalid the present temporary suspension. The Board fully recognizes that the temporary certificate of Bonanza may well be renewed. The Board has many times expressed its hope and confidence in the success of the local air service experiment and it would not likely have provided a service which it thought would so soon come to an end.[23] However, it must be equally recognized that the success of any particular local service air carrier and the extension of its authority cannot now be accepted as either a legal fact or a foregone conclusion. This is particularly true with respect to an indefinite extension or a series of extensions producing that effect.

The Board in the past has terminated entirely a local service operation where the public convenience and necessity did not warrant its continuance.[24] In many cases where a temporary local service operation has been extended beyond its original expiration date, the Board has made adjustments in its service pattern by changing some of the points to be served.[25] The entire local air service development is still in an early

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[23] Generally speaking, as a group the local service air carriers, although they have by no means attained economic self-sufficiency, have made substantial progress in that direction.

[24] *Florida Airways Certificate Extension,* 10 C.A.B. 93 (1949).

[25] *Wisconsin Central Renewal Case,* supra, *West Coast Renewal Case,* decided March 13, 1952, Order Serial No. E-6220. In this latter case the Board declined to renew the local carrier at certain points leaving only trunk line service.

and experimental stage. It has already undergone many revisions from the original "feeder" concept, which formed the basis of the first operations authorized in 1946. The ultimate stage of this development is clearly not now known. New technical developments could change the direction of the experiment just as they have produced a drastic revision in the pattern of trunkline operations and service in the few years since 1945.[26]

While it may reasonably be assumed that El Centro and Yuma will receive some air service for an indefinite period, it cannot be assumed that such service will be rendered by Bonanza rather than Western or that it will always be a part of the route structure provided in this case. The present validity of Board action cannot turn on a judgment of the unknown. Western is amply protected against future improper action by its right to a full administrative hearing before an extension of the present suspension can be ordered, and the right of court review of any Board order entered after such hearing.

Even if it be conceded *arguendo* that Western's suspension will continue indefinitely, such fact would not render the suspension an improper use of the Board's authority under section 401(h). An indefinite suspension is neither in legal concept nor in fact the equivalent of a permanent suspension or a revocation. It has previously been demonstrated that suspension and revocation are not the same. A revocation is a perma-

[26] Postwar long-range aircraft made technically possible for the first time transcontinental nonstop and other similar services which has produced many changes.

nent withdrawal of an operating authority by the Board. It can never be revived, but could only be given anew after application and hearing under the standards of section 401(d). Suspension, even of an indefinite character, on the other hand is not a final and permanent determination of a right. The right continues in existence to be revived when, and if, the factors of the public convenience and necessity giving rise to the suspension no longer pertain.

Section 401(h) does not impose any limitation on the Board's authority to suspend based on the length of the suspension. The length of a suspension under the statute is, as Western concedes,[27] coterminous with the existence of the public convenience and necessity factors which require its imposition. Such factors are clearly of an indefinite nature in many cases. Consequently, to determine the validity of a suspension on the question of its length in effect would be to say that a particular suspension must come to an end mechanically at a given time even though the public convenience and necessity require its continuance. Such a construction would rewrite the statute.[28]

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[27] Western states with respect to the circumstances under which it believes suspension to be proper that the propriety of the application of section 401(h) is not affected by the existence of a condition requiring an indefinite suspension which by the passage of time might prove to be permanent (Pet. Br. 36).

[28] The Board had occasion to consider the question of the length of a suspension under section 401(h) in *All American Airways, Suspension Case, supra,* where it said (10 C.A.B. at p. 35):

> The exact time at which we should order the suspension to be ended cannot and need not be specified at this time. The determination that the public convenience and necessity re-

B. The Board's Suspension of Western's Certificate Authority and the Certification of Bonanza Met the Standards Imposed by Section 401.

Section 401(h) of the Civil Aeronautics Act provides that the Board may suspend an existing certificate, in whole or in part, where the public conveneince and necessity so require. This is the same standard provided for the certification of a carrier under section 401(d) of the Act. Consequently, both the suspension of Western and the certification of Bonanza were governed by the application of this test of the requirements of the public convenience and necessity.

The determination of the meaning of this standard is not left to the whim or the caprice of the Board. The

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quire suspension is based on facts which are subject to change. The lapse of a substantial period of time may bring substantial changes in the factors appropriate to this proceeding and in the weight which the Board accords to them. Although less probable, the lapse of even a short period of time may indicate new or changed factual conditions which affect the need for suspension. Nevertheless, we have no present indication as to when these changes might take place. Thus it does not seeu possible to forecast accurately the date on which the suspension of all or part of the certificate is no longer required by the public convenience and necessity. The suspension should continue as long as the factors presently requiring such suspension remain substantially unchanged, and should be terminated whenever it is demonstrated to the Board that circumstances have changed in such manner that suspension of all or part of the certificate is no longer required by the public convenience and necessity. Therefore we shall leave that decision to the procedures which may be invoked in the future by the interested parties.

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"It has been contended that, while the Board clearly has the authority to suspend a certificate for a reasonable period of time if required by the public convenience and necessity,

standard appears in almost all public utility statutes and has a long history of judicial and administrative application. In addition, section 2 of the Civil Aeronautics Act [29] specifically provides that the Board shall consider a number of things as in accordance with the public convenience and necessity. These standards, which Western describes as "clear and compelling," [30] look toward the encouragement and development of a sound air transport system properly adapted to the needs of the commerce of the United States, the Postal Service, and the national defense.[31]

The Board in applying the standards of section 2 in

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the suspension of the certificate for an indefinite or unreasonable period of time would be tantamount to a revocation. While we do not feel required to define the length of time for which a certificate may be suspended before it becomes a revocation, it would not appear to us that the length of time alone is controlling. We recognize that there is a possible abuse of discretion in an administrative agency in attempting to discipline a carrier by suspending its certificate on the basis of facts which would not justify a revocation. However, it seems apparent that where the record developed after extensive hearing clearly indicates that the public convenience no longer require a service, such substantive test is sufficient to prevent any abuse, particularly where procedures remain open, as they do here, whereby interested parties may seek termination of the suspension by the Board.

[29] Section 2 is set forth in full at page 31 of Western's brief.

[30] Pet. Br. 30.

[31] In *Northwest Air Duluth Twin Cities Operation,* 1 C.A.B. 578 (1940), the Board pointed out with respect to the standards of section 2, that while Congress thereby intended the Board to exercise a firm control over the expansion of air transportation, "it was not the Congressional intent that the air transportation system of the country should be 'frozen' to its present status."

this case found a public need for a type of local air service which would provide air transportation from each of the intermediate points to and from the large city terminals and between the intermediate points. Such a service is of the type provided under temporary certificates by some 17 local service carriers now operating in various areas of the United States. It is subject to restrictions in the certificate which insure a local type of service.[32] Such service is designed to fill the purely local need for air transportation in a given area. It differs markedly from a trunkline type of service,

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[32] The certificate issued to Bonanza in this case contained in paragraphs (1), (3), (4) of its terms, conditions and limitations the following restrictions: (Pet. Appendix 64, 65)

> "(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points."
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> * * * * * *
>
> "(3) On each trip operated by the holder over all or part of one of the two route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (1) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the requirements of such condition, (2) the holder is authorized by the Board to suspend service, or (3) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control."
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> "(4) Each trip scheduled between the co-terminal points Los Angeles and Long Beach, Calf., on the one hand and the intermediate point San Diego, Calif., on the other shall originate or terminate at Phoenix, Ariz."

which does not operate subject to the certificate restrictions imposed on local service carriers, and which is free to be operated and is normally operated in a manner so as to provide nonstop long-haul service between terminals or terminal-to-terminal service stopping at only some intermediate points on particular flights.

This differentiation of types of service is a classification that the Board is entitled to make in determining the public convenience and necessity. Section 416(a) of the Civil Aeronautics Act recognizes that there may be differences in types of air service and carriers. This section reads as follows:

> The Authority [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the service performed by such air carrier shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority finds necessary in the public interest.

To the same end is the provision of section 401(f) which authorizes the Board to impose upon certificates issued under section 401(d) "such reasonable terms, conditions, and limitations as the public interest may require."

The Board has consistently distinguished between trunkline type of service and local air service as an element of the public convenience and necessity in granting certificates under section 401(d) to independent local operators for local air service rather than to

trunkline operators. Western has made no contention that the Board is powerless to distinguish between trunkline service and local air service in determining public convenience and necessity; nor can it be seen how such a contention could be made. Since Western concedes that the Board has a suspension power based on the public convenience and necessity, it would clearly seem to follow that section 401 of the Civil Aeronautics Act permitted the Board to determine, if the facts supported such a finding, that the public convenience and necessity required a local air service between Phoenix and the West Coast and that the service should be operated by Bonanza, a local air carrier, and not by Western, a trunkline carrier.

The Board's reasons for the choice of Bonanza over Western to operate the local air service between Phoenix and Los Angeles are fully set forth in the counterstatement in this brief.[33] They fall into two main categories:

First, it is the Board's general policy that local air services be operated by local air carriers rather than trunkline carriers. The principal rationale behind this policy is the belief that local operators have a greater incentive to develop the local air service market, which primarily serves smaller communities, than do trunkline carriers whose primary business interest is in their large terminal-to-terminal service. For example, it would be beyond reason to expect Western to be as fully interested in service to El Centro and Yuma as

[33] It is undisputed that the traffic at El Centro and Yuma or the other points involved would not support two carriers.

between Los Angeles and San Francisco. This is a reasonable policy that bears an obvious relationship to the standards of section 2 of the Act directed to the development of an air transport system, properly adapted to the needs of the commerce, the Postal Service, and the national defense of the country.

Second, this policy is supported and reinforced in this case by the past history of Western's operations at El Centro and Yuma. Western emphasizes its interest for a decade in the area involved. However, the record shows that the thrust of Western's interest over the years was to obtain a trunkline routeto Phoenix, that it had no real interest in local service at El Centro and Yuma. It reduced service to those points below the point of adequacy and at one time virtually abandoned the points.[34] Western only revived interest again in El Centro and Yuma in connection with a further effort to get to Phoenix. This revival was described by the Examiner in a finding adopted by the Board, as follows (Pet. Appendix, 57 and 58):

> . . . This belated enthusiasm appears to have resulted from three factors, none of which involved fulfilling its duty to provide these cities with the service needed. First, Western feared competition from Southwest on its Los Angeles-San Diego segment; second, the authorization of Southwest to provide a San Diego-Phoenix service rekindled

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[34] It has been pointed out in the counterstatement that in 1948 Western tried to transfer its certificate right to Arizona Airways and that in 1949 it proposed to suspend service at El Centro and Yuma altogether.

Western's ambitions and hopes for a San Diego-Phoenix route; and third, Western feared that it might be suspended at San Bernardino and Palm Springs as well as at El Centro and Yuma. Consequently, Western decided to establish more frequent schedules to the points proposed for suspension. Although Western presented no affirmative case to show that additional San Diego-Phoenix terminal-to-terminal service was needed and consented to accept a restriction on its San Diego-Phoenix operation inhibiting effective competition for San Diego-Phoenix and Los Angeles-Phoenix traffic, Western's protestations are not convincing. Based on Western's previous record it would appear that its primary interest in this proceeding is to obtain an unrestricted San Diego-Phoenix route and to use the local service operation as a "stepping stone" or "hat in the door" method of accomplishing this result. It can easily be anticipated that in the event this aim is achieved in this proceeding Western will return to the Board in a short time with an application requesting the lifting of the local service restriction and a story that unless supported by terminal-to-terminal traffic the El Centro-Yuma-Ajo segment will never be economically justified. Based on the record to date Western appears to be a very "reluctant dragon" when it comes to service to El Centro, Yuma, and Ajo.

In sum, it was lawful and proper for the Board in this case to base the partial suspension of Western's

certificate and the certification of Bonanza upon the requirements of the public convenience and necessity as reflected in the need for local air service, the insufficiency of traffic to support more than one type of service, and the conclusion that Bonanza would better fulfill the public need.

Western contends that the Civil Aeronautics Act permits suspension only in cases where no service at all is required any longer because of drastic economic upheavals. This narrow interpretation of section 401(h) is directly contrary to that made by the United States Court of Appeals for the District of Columbia.[35] In 1947, Pan American-Grace Airways, Inc. (Panagra) asked the Board to suspend the entire certificate of its competitor, Braniff Airways, Inc. (Braniff) to operate between the United States and Buenos Aires for a period of 5 years or to alter, amend, or modify the certificate by striking out points south of Balboa. The request was based on economic and competitive considerations. The Board declined to take action. On appeal, the Court quoted section 401(h) and declared: (p. 36)

> It is clear from this provision that the Board had the power, after notice and hearing, to grant Panagra's petition and to suspend Braniff's certificate, subject to the President's approval.

If 401(h) gave the Board power to suspend Braniff's whole South American operation for a period of 5

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[35] *Pan American-Grace Airways* v. *Civil Aeronautics Board,* 178 F. 2d 34 (C.A. D.C. (1948)).

years for competitive reasons, it certainly gives the Board power to suspend two points on Western's Route No. 13 for the period and reasons here involved.

The necessary effect of Western's argument is a substantial limitation upon the standard of public convenience and necessity as it appears in section 401(h). It would preclude the Board, for example, from discontinuing service by one of two carriers serving a point or substituting service at a point or points even though there was present the clearest economic necessity for such action or even if it was required by the national defense, one of the cornerstones of public convenience and necessity under section 2 of the Act.

Western justifies its proposed construction of section 401(h) by the argument that otherwise the basic purposes of the Civil Aeronautics Act to insure stability of routes and security of investment would be upset. The Board's action in this case is not only in nowise inconsistent with the purposes of the Civil Aeronautics Act but contributes to the achievement of those purposes. These basic purposes are set forth in section 2 of the Act. Nowhere in that section does one find mention of a vested right through the grant of a certificate. The whole emphasis is to the contrary and looks toward the development of a sound air transport system and the fostering of sound economic conditions through proper regulation by the administrative agency.

One element of such regulation is the protection accorded certificates by the grant of power to the Board to control competition by issuing certificates only where justified by the public convenience and necessity. It was with this protection that Congress was pri-

marily concerned in the enactment of the Civil Aeronautics Act. That statute came into being in response to threats of cut-throat competition and was primarily designed to substitute therefor a concept of regulated competiion. A corollary to this protection is the power of the Board to alter, amend, modify, or suspend where the public convenience and necessity so require. Such power contributes to a sound air transport system. The fears of Western that the stability of the industry will be destroyed seem somewhat exaggerated in view of the fact that, despite the existence of the power in the Board to alter, amend, modify, or suspend, it is common knowledge that the stability and strength of the individual air carriers and the air transportation industry as a whole have increased tremendously since passage of the Civil Aeronautics Act in 1938.[36]

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[36] Pan American expressed similar fears in the *Caribbean Area Case, supra,* and the Board answered the carrier in these words at p. 550:

> The fears of Pan American that the power to diminish authority under a certificate would make all carriers insecure in their rights and tend to destroy the stability of the air transport system are unjustified and cannot serve to change the conclusions that have been reached. We are fully aware of the necessity of maintaining stability in the air transport industry if the objectives of the Act are to be accomplished, and agree that at least one purpose in providing for certificates of public convenience and necessity as a method of control was to bring about such stability. In practice, this purpose has been realized. For example, every airline is protected from competition other than that authorized is accordance with the substantive rules and procedural requirements specified by Congress. Apart from this, the provision for mail compensation based on the need of the carrier has given to the airlines a stabilizing factor and a means of security not enjoyed by either rail or motor carriers.

In cases like the present the power conferred by section 401(h) makes it possible for the Board to insure the kind of service needed and the development of the service by a carrier devoted wholeheartedly to that end.

The Board pointed out in the *Caribbean Area Case,* 9 C.A.B. 534 (1948), that a narrow construction of section 401(h) would be wholly inconsistent with the basic objectives of the Civil Aeronautics Act and would make the private interests of the units comprising the air transport system paramount to the public welfare (pp. 548-549):

> . . . Under such an interpretation, the Board's appraisal of the factors set forth by Congress as its guide, once made and given expression in a certificate, would become irrevocable, notwithstanding subsequent changes in the facts upon which the Board's judgment was based that might turn once sound action into an instrument for thwarting the policy of the Act. There would be substituted for a transportation pattern, keyed to the public need, a route structure, in important respects dependent upon the will of the individual carriers and subject to change, no matter how

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But nothing in the Act indicates that this security and stability was an end to be sought at any price and without regard to the consequences. On the contrary, there can be no doubt that in conferring upon air carriers the benefits of the Act, Congress likewise imposed obligations for the good of the public, and intended that, where conflicts between private and public interests occurred, the private interests of the certificate holder should yield to the broader interests of the public as embodied in the concept of public convenience and necessity.

urgent the public need for such change, only with the consent of those carriers.

The consequences that might flow from the restrictive interpretation of section 401(h) that has been urged by Pan American are forcefully demonstrated in other ways. For example, a small carrier, operating a needed but economically weak route, could be driven to even direr financial straits by the competition of a more powerful rival for traffic at a point which, though relatively unimportant in the over-all operations of the larger carrier, constituted a major source of revenue for the smaller line, while the Board sat idly by, impotent to take the only action that under the circumstances would serve to accomplish the objectives of the Act. In such a situation, the Board might well be faced with the equally unsatisfactory alternatives of permitting the small carrier to be forced into insolvency or of maintaining its ability to operate the required services by means of steadily increasing Government subsidy in the form of mail pay. And this situation could occur with respect to a point or points which, if served by the small carrier alone, would supply sufficient revenues to permit it to secure financial strength, and possibly complete self-sufficiency. We do not believe that Congress intended any such results.

The benefits of sound regulation would be denied by the construction advanced by Western and there would be substituted therefor a rigid and frozen air transport system supported by Federal subsidy. Such a result is

contrary, not only to the statute, but to the needs of air transportation which is non-rigid and ever changing.

Western in large part predicates its contention that the suspension power will destroy the stability of the industry, unless narrowly circumscribed, on an assumption of capricious and arbitrary application thereof by the Board. However, such an assumption cannot be made. The Board must act in accordance with statutory standards and the courts have power to set aside any Board action not in conformance therewith.

III.

The Suspension of Western's Authority to Serve El Centro and Yuma Is Not Subject to Attack on Constitutional Grounds.

Western rather briefly, if not perfunctorily,[37] contends that the Board's suspension order is violative of the Fifth Amendment in that it involves a taking of Western's property without just compensation (Br. 37-40). We think that there are several answers which are dispositive of this contention on the merits, and they will be stated briefly *infra*. At the outset, however, petitioner is met with an insuperable statutory bar to raising the constitutional question here.

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[37] Western regards the other points it urges as conclusive, and presents the constitutional argument, "largely that it may not be deemed waived" (R. 37).

A. Western Did Not Raise the Constitutional Issue Before the Board, and Is Therefore Barred by Section 1006(e) of the Civil Aeronautics Act from Raising It on Judicial Review.

Section 1006(e) of the Civil Aeronautics Act reads as follows:

> "The findings of fact by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 1006(e) has regularly been applied, as its terms plainly require, to bar judicial review of issues not presented before the Board. *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 183 F. 2d 975 (C.A. D.C. 1949); *New England Air Express* v. *Civil Aeronautics Board* (Case No. 11274, C.A. D.C., decided February 21, 1952).

No reasonable ground is suggested here for Western's failure to present its constitutional objection to the Board. The suspension order was not a surprise development; the suspension issue was argued both to the Examiner and to the Board. The purpose of section 1006(e) is, of course, to afford the administrative agency "an opportunity to consider on the merits questions to be argued upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256 (1943). Even constitutional questions will not be considered when they might have been, but were not, raised in the course of orderly ad-

ministrative process. *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947). That rule is fully applicable here.

B. In Any Event, the Suspension of Part of Western's Certificate Was Not a "taking" of Western's Property.

The constitutional contention must also fail on the merits. First, a certificate of public convenience and necessity is a grant limited by the terms of the enabling statute. One of the express provisions of that statute is that "No certificate shall confer any proprietary property, or exclusive right in the use of any air space, civil airway, loading area, or air-navigation locality" (Section 401(j), (49 U.S.C. 481(i)). Plainly, the taking of something which is not property cannot be the taking of property without just compensation within the meaning of the Fifth Amendment.

Second, even if it be assured, *arguendo,* that a certificate creates some kind of a property interest in the constitutional sense, the scope of the assumed interest is nevertheless to be found in the enabling act. *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419 (1951).[38] Section 401(h) of the Act specifically reserves to the Board the powers to suspend, alter or modify certificates. Petitioner, and all other holders of certificates of convenience and necessity acquired whatever rights they may possess subject to that reserved

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[38] And see *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U.S. 287 (1926); *Detroit United Ry.* v. *City of Detroit,* 229 U.S. 39 (1913); *American Bond & Mortgage Co.* v. *United States,* 52 F. 2d 318 (C.A. 7, 1931) cert. denied 215 U.S. 538 (1932); *Trinity Methodist Church South* v. *Federal Radio Commission,* 62 F. 2d 850 (C.A. D.C., 1932).

power.[39] The suggestion that section 401(h) is itself unconstitutional (Pet. Br. 1) is not elaborated by petitioner, and is plainly untenable.

Third, there has been no "taking" for public use, but the exercise of a regulatory power over commerce. The United States is not now proposing to "use" the part of Western's Route 13 for its own purposes. That portion of the route has been suspended, temporarily, but it has not ben retrieved by the Government or given to Bonanza. True, Bonanza will be allowed to serve Yuma and El Centro, but as a part of a different route, and a different kind of service (i.e., local rather than trunkline).

Finally, it is clear that Western has not made any showing that it will suffer a property loss. The losses which it asserts will flow from the suspension are (1) operation losses in developing service at Yuma and El Centro; (2) losses of future profits from service at the points; and (3) losses on its ground facilities at the points. Western has not established and cannot estab-

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[39] Even if the Act had not specifically reserved power in the Board to alter or suspend a certificate of convenience and necessity no constitutional question would be raised by a subsequent alteration of such a certificate pursuant to statute. One who acquires property in an area subject to the power of Congress to regulate interstate commerce does so "subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation". *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400 (1907). As the Supreme Court said in *Knox* v. *Lee,* 12 Wall, 457, 550 (1870) referring to the just compensation requirement of the Fifth Amendment, "that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." And see *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U.S. 467 (1911) and cases cited at pp. 480-484.

lish that it will incur any loss whatsoever in any of the three categories it lists.

Up to October 1, 1951, Western was a need carrier on a subsidy mail rate, which meant that it received compensation in the form of mail pay for route development expenses and operational losses incurred as a result of its operation to El Centro and Yuma under honest, economical, and efficient management.[40] Western clearly is not entitled to collect twice on this claim.

Petitioner cannot establish that it would have any profits from its El Centro and Yuma operation in the future. Its exhibits in the proceeding showed that on an allocated cost basis during 1949 Western incurred losses at both Yuma and El Centro.[41] For the 12 months period ending September 30, 1951, on an allocated cost basis Western would show an over-all profit of less than $100 at the two points. What the future will bring is a guess, but on past experience certainly not any substantial profits.

Petitioner has made no showing that it will incur any financial loss with respect to its ground facilities. In an inflationary period such as at present, such loss cannot be assumed. Moreover, Bonanza in its memorandum to this court on Wetsern's motion for a stay stated it was ready, willing, and able to utilize substantially all of Western's ground equipment and fa-

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[40] Between May 1, 1944 and October 1, 1951, Western received a total of $7,696,938 in mail pay, approximately half of which at least represented a subsidy.

[41] On an added cost basis there was a loss of approximately $18,500 at Yuma and a profit of $9,300 at El Centro.

cilities at El Centro and Yuma and to pay Western such reasonable sums as are required for the use or purchase of the equipment and facilities.

CONCLUSION

Upon the basis of the foregoing reasons and authorities, the Board's order should be affirmed.

Respectfully submitted,

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No. 13245

BRIEF FOR AMICUS CURIAE

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

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For the Ninth Circuit

No. 13245

Western Air Lines, Inc., *Petitioner,*

v.

Civil Aeronautics Board, *Respondent.*

BRIEF FOR AMICUS CURIAE

JURISDICTION OF THE COURT

This Honorable Court has jurisdiction to review this proceeding under Section 1006 of the Civil Aeronautics Act, Act of June 23, 1938, as amended, 52 Stat. 1024, 49 U.S.C. 646, and under Section 10 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1009.

STATEMENT OF THE CASE

Petitioner, Western Air Lines, Inc., seeks review of an order of Respondent, Civil Aeronautics Board, Order No. E-6040, dated January 17, 1952 which provided in part that (I) the temporary certificate of public con-

venience and necessity of Bonanza Air Lines, Inc. should be amended to authorize additional local air service between Los Angeles, San Diego and Phoenix via various intermediate stations including El Centro and Yuma, and that (II) Petitioner's permanent authority to serve El Centro and Yuma should be suspended. The duration of Bonanza's authority to serve El Centro and Yuma was made co-terminus with the expiration date of its basic route certificate (December 31, 1952) as was the suspension of Western's rights at these two stations; however, Respondent recognized that Bonanza's temporary certificate might be renewed for an additional period of time. If that contingency materializes, Bonanza's authority to serve El Centro and Yuma will be extended for such additional time and correspondingly the suspension of Western's authority will likewise be so extended.

Petitioner sought a stay of Respondent's order pending judicial review and on February 18, 1952, this Court granted a stay and entered the following order:

> ". . . stay pending a determination by the Court of the legal issue of whether respondent had statutory power, after notice and hearing, to suspend petitioner's authority to serve El Centro, California, and Yuma, Arizona, upon findings that the public convenience and necessity no longer required service to such points by petitioner, but rather required service by the intervenor".

The Court directed that the parties file briefs directed solely to the legal issue presented in the above order.

On March 19, 1952, this Court granted Midwest Airlines, Inc., and Wisconsin Central Airlines, Inc., permission to file an Amicus Curiae brief in the above cause because of their interest in the outcome of this litigation.

QUESTIONS PRESENTED

The questions presented by the petition for review are as follows:

(I) Does Section 401(h) of the Civil Aeronautics Act give Respondent statutory authority to suspend a permanently certificated air carrier at a point or points and to substitute therefor another carrier?

(II) If the answer to the above question is in the affirmative, did the Civil Aeronautics Board properly exercise its authority to suspend in the case presented here for review?

(III) If Section 401(h) does give Respondent authority to suspend a permanent certificate and if Respondent exercised such authority, does such action involve a taking of property without compensation in violation of the 5th Amendment of the Constitution?

SUMMARY OF ARGUMENT

(I) Section 401(h) of the Civil Aeronautics Act authorizes Respondent after notice and hearing to "suspend" a certificate in whole or in part if "the public convenience and necessity so require." This language is so clear and unambiguous that there is no room for construction by this Court. However, even if this Court were to examine the legislative history of the statute, the expressed desire to provide for stability within the air transportation system, the broad objectives of the Civil Aeronautics Act, and the other relevant provisions of the Statute, it would find no reason for adopting any but the usual and literal meaning of the words of this Statute.

(II) Respondent's action in suspending Western at El Centro and Yuma was not as alleged by Petitioner a revocation which could only be ordered for an intentional violation of the Statute but was in fact a decision to make Petitioner's authority temporarily inoperative. That the action taken was not a "device" to enlarge Respondent's area of jurisdiction is completely explained by the fact that Respondent needed no such device since it could eliminate the same two points under consideration by means of its statutory authority to modify, alter or amend a certificate.

(III) Section 401(h), as interpreted, does not involve a taking of the Petitioner's property without just compensation even if it be assumed that Petitioner's may now raise this issue when it failed to do so before the agency. It is firmly established that Petitioner had no rights greater than those conferred by its certificate and the limitations made thereon. One such limitation was the reserved power of the Civil Aeronautics Board to suspend that certificate in whole or in part, whenever such action was required by the public convenience and necessity. That being the case, Petitioner has not been deprived of a right for which there is constitutional protection.

I. THE CIVIL AERONAUTICS BOARD HAS STATUTORY AUTHORITY TO SUSPEND A PERMANENTLY CERTIFICATED AIR CARRIER AT A POINT OR POINTS AND TO SUBSTITUTE THEREFOR ANOTHER CARRIER.

A. The Statutory Authority of Section 401(h) Is Clear and Unequivocal.

Section 401(h) of the Civil Aeronautics Act of 1939, as amended (52 Stat. 987, 49 U.S.C. 481), provides in part as follows:

> "The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may . . . suspend any such certificate, in whole or in part, if the public convenience and necessity so require . . ."

With respect to the interpretation of this statutory provision there exists only two possible questions:

1. What does it mean to "suspend" a certificate in whole or in part?
2. What are the standards which control public convenience and necessity?

The Court in this case has ruled out the second of these two questions in its order dated February 18, 1952, by stating the legal proposition here involved in such a manner as to assume for the purposes of this case that the public convenience and necessity no longer required service at El Centro, California, and Yuma, Arizona, by Western Airlines, but rather required service by Bonanza Airlines.[1]

The sole question of statutory interpretation at issue, therefore, concerns the definition of the word "suspend", as used in the context of Section 401(h). Webster defines "suspend" as follows:

> "to debar temporarily from any privilege, to cause to cease for a time, to make temporarily inoperative".

The Civil Aeronautics Board itself has recognized that this commonly accepted definition of the word "suspend" is the one to govern the operation of the statute. In the *All American Airways, Inc. Suspension Case,* 10 CAB

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[1] ". . . stay pending a determination by the Court of the legal issue of whether respondent had statutory power, after notice and hearing, to suspend petitioner's authority to serve El Centro, California, and Yuma, Arizona, upon findings that the public convenience and necessity no longer required service to such points by petitioner, but rather required service by the intervenor".

24, 27 (1949), the Board made the following observations with respect to its understanding of the word "suspend":

> ". . . suspension permits possible return to the original status . . . suspension, while not imparting the same permanence as either revocation or abandonment may be invoked by either the carrier or upon the initiative of the Board."

The only time that Sec. 401(h) was discussed by a Court there seemed to be absolutely no problem in connection with the scope of the authority conferred. In the case of *Pan American-Grace Airways v. Civil Aeronautics Board,* 178 F. 2d 34, 36 (App. D. C. 1949), the Court said:

> "It is *clear* from this provision (sec. 401 h) that the Board had the power, after notice and hearing, to grant Panagra's petition and to suspend Braniff's certificate, subject to the President's approval." (Emphasis added)

B. Where the Statute As Here Is Free From Ambiguity There Is No Room for Construction By the Court.

The statutory authority of the Civil Aeronautics Board to suspend a certificate in whole or in part if the public convenience or necessity so require is so free from doubt, so unambiguous that this Court may not properly speculate as to the intent of the Congress. In the case of *Helvring v. Hammel,* 311 U. S. 504, 85 L. Ed. 303 (1941), the Supreme Court made the following observation:

> "True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance would lead to absurd results, *United States v. Katz,* 271 U. S. 354, 362, or would thwart the obvious purpose of the statute, *Hargar Company v. Helvering,* 308 U. S. 389. But courts are not free to

> reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure".

California courts are uniformly in accord with the above stated tenet of statutory construction. In the case of *Hurley v. Rubis,* 233 P. 2d 27 (1951), the court made the following statement:

> "It is a cardinal rule that a statute free from uncertainty and ambiguity needs no interpretation. A court may not by judicial construction substitute its ideas of intent of a statute when that intent is unmistakably expressed and when the statute is not ambiguous or uncertain . . ."

The following cases are to the same effect: *Deluca v. Fish and Game Commission,* 229 P. 2d 398, 103 Cal. App. 2d 273 (1951); *People v. Knowles,* 35 Cal. 2d 175, 217 P. 2d 1 (1950):

C. Even If the Court Were to Look Beyond the Language of the Statute to Seek the Intention of Congress No Result Different From the Plain Meaning of the Language Would Be Found.

1. *A legislative history of the Civil Aeronautics Act is silent on the intention of Congress in respect to Section 401(h).*

In the *Caribbean Area Case,* 9 CAB 534 (1948), counsel for the competing airlines presented to the Board an exhaustive analysis of the history of the Civil Aeronautics Act and after such presentation the Civil Aeronautics Board made the following observations:

> "The legislative history of the Act has been cited to support the construction that has been urged before us, but we find nothing in that background determinative of our powers. Such material as has been called to our attention is completely inconclusive . . ." (p. 547).

2. *Power to suspend a permanently certificated carrier would not destroy the stability of the air transportation system.*

Petitioner has argued that the power to diminish the scope of a permanent certificate would make it insecure in its rights and would tend to destroy the stability of the air transportation system. To this argument there are at least two completely satisfactory answers: First, while stability in the air transportation industry is generally desirable, it is not to be secured at the price of other and more important elements of public convenience and necessity; and secondly, the power to suspend does not create such instability as to jeopardize the air transportation industry.

Both of these arguments were discussed in detail by the Civil Aeronautics Board in the *Caribbean Area Case,* supra, where it was noted that one of the objectives of conferring a certificate of public convenience and necessity was to bring about stability within the industry; but it was nevertheless recognized that such certificates carry with them obligations which are embodied in the concept of public convenience and necessity. Where the public convenience and necessity require suspension, therefore, the individual carrier's otherwise important right to stability must necessarily be subordinated.

This proposition is elementary in the field of public utility regulation. In the case of *State v. Public Service Commission,* 232 Mo. App. 535, 111 S. W. 2d 222, 229 (1927), the court said:

> "Let it be conceded that the act establishing the Public Service Commission, defining its powers and prescribing its duties, is indicative of the policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental."

The suggestion that the power to suspend creates an atmosphere of instability seems highly doubtful and greatly exaggerated. Section 401(h) requires that suspension shall be ordered only after (1) notice, (2) a hearing, and (3) a finding that the suspension is required by the public convenience and necessity. The finding of the agency is limited by standards announced by the court in the case of *Johnston Broadcasting Co. v. Federal Communications Commission,* 86 App. D. C. 46, 175 F. 2d 351, 358 (1949)

> ". . . (1) The bases of reasons for the final conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

Finally, the Civil Aeronautics Act provides for judicial review of orders issued by the Civil Aeronautics Board which further safeguards the airline industry against suspensions which are not legitimately required by the public convenience and necessity (52 Stat. 1024, 49 U.S.C. 646).

3. *The plain meaning of Section 401(h) is consistent with the broad objectives of the Civil Aeronautics Act.*

Section 2 of the Civil Aeronautics Act of 1939 envisages the broadest possible powers in the Civil Aeronautics Board in connection with the regulation of in-

terstate air transportation. This policy is quoted in full below.[2]

The court's attention is also directed to Section 205 of the Civil Aeronautics Act of 1938, as amended, (52 Stat. 984, 49 U.S.C. 425), which reaffirms that the Civil Aeronautics Board is empowered to perform all such acts as may be necessary in the exercise of its duties under the statute.[3]

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[2] Sec. 2 (52 Stat. 980, 49 U.S.C. 402). In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

[3] "Sec. 205 (52 Stat. 984, 49 U.S.C. 425). (a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

In the *Caribbean Area Case,* supra, the Civil Aeronautics Board discussed at length its understanding of the policy of the Civil Aeronautics Act vis-a-vis its power to make route adjustments. This discussion is quoted below in full.[4]

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[4] "The soundness of the construction we have given section 401(h) becomes apparent when tested by the broad objectives of the Act. In the Civil Aeronautics Act, Congress provided a comprehensive regulatory scheme designed to assure an air transportation system adequate to meet the public needs. Not the wishes or desires of the units comprising that system, but the overriding public welfare is the thought that pervades the entire statute. Moreover, the statutory plan envisages no mere passive watch over civil aviation but a positive course of action designed to foster actively the healthy and orderly growth of air transportation for the national good. The Board, as the agency entrusted with administration of the Act, was given as a guide to its action such fundamental purposes as "the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense". To assure the accomplishment of the ends sought to be attained, Congress vested the Board with broad powers commensurate with the task assigned it.

"A narrow construction of the Act that would exclude from the Board's powers under section 401(h) all authority to make changes in certificates of public convenience and necessity, diminishing in any way the rights thereunder, would be wholly inconsistent with the basic objectives of the Act, and would make the private interests of the units comprising the air transportation system paramount to the public welfare. Under such an interpretation, the Board's appraisal of the factors set forth by Congress as its guide, once made and given expression in a certificate, would become irrevocable, notwithstanding subsequent changes in the facts upon which the Board's judgment was based that might turn once sound action into an instrument for thwarting the policy of the Act. There would be substituted for a transportation pattern, keyed to the public need, a route structure, in important respects dependent upon the will of the individual carriers and subject to change, no matter how urgent the public need for such change, only with the consent of those carriers.

"The consequences that might flow from the restrictive interpretation of section 401(h) that has been urged by Pan American

The position taken by the Civil Aeronautics Board in the above case is consistent with the construction procedure announced by the Supreme Court in the case of *Security and Exchange Commission v. Joiner Leasing Corporation,* 320 U.S. 344, 88 L. Ed. 88 (1943), where the Court at page 150 said:

> "However well these rules may serve at times to aid in deciphering legislative intent, they have long been subordinated by the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in the particular cases the generally expressed legislative policy."

The following cases are to the same effect: *Reynolds Spring Co.* v. *Commissioner of Internal Revenue,* 181 F. 2d 638, 640 (CCA 6th 1950); *Barrett* v. *Hunter,* 180 F. 2d 510, 513 (CCA 10th 1950); *Warren* v. *United States,* 177 F. 2d 596, 598, (CCA 10th 1949); *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619, 621 (CCA 7th 1949).

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are forcefully demonstrated in other ways. For example, a small carrier, operating a needed but economically weak route, could be driven to even direr financial straits by the competition of a more powerful rival for traffic at a point which, though relatively unimportant in the over-all operations of the large carrier, constituted a major source of revenue for the smaller line, while the Board sat idly by, impotent to take the only action that under the circumstances would serve to accomplish the objectives of the Act. In such a situation the Board might well be faced with the equally unsatisfactory alternatives of permitting the small carrier to be forced into insolvency or of maintaining its ability to operate the required services by means of steadily increasing Government subsidy in the form of mail pay. And this situation could occur with respect to a point or points which, if served by the small carrier alone, would supply sufficient revenues to permit it to secure financial strength, and possibly complete self-sufficiency. We do not believe that Congress intended any such results."

4. *The power to suspend in Section 401(h) is not inconsistent with other sections of the Act.*

Petitioner argues that the power to suspend any part of a "grandfather" certificate would be inconsistent with the grant of such certificate, provided by Section 401(e)(1) of the Civil Aeronautics Act, since that section in effect established by legislation the routes which are required by the public convenience and necessity. It is a sufficient answer to this argument to note that Section 401(h) authorizes the Civil Aeronautics Board to suspend any certificate *in whole of in part* when such suspension is required by the public convenience and necessity. The statute does not authorize the Board to suspend in whole or in part certificates other than "grandfather" certificates. The all inclusive language of the statute must be taken literally.

Petitioner has also argued that if respondent had authority to suspend a certificate in whole or in part such authority would in effect duplicate the provision for a temporary certificate provided for in Section 401(d)(2) of the Act. The argument is advanced that Congress would not have authorized two methods of accomplishing the same objective and, consequently, the Court must rule that the authority to suspend in Section 401(h) does not mean what the language says. A similar though more difficult problem of statutory interpretation arises when Congress expressly authorizes one of two obvious procedures but is silent as to the alternative procedure. In such circumstances the Supreme Court has stated that the literal language of the statute must govern. In the case of *Neuburger* v. *Commissioner,* 311 U. S. 83, 85 L. Ed. 58 (1940) the Supreme Court said at page 88:

> "The maxim 'expressio unius est exclusio alterius' is an aid to construction, not a rule of law. It can never over-ride clear and contrary evidence of Congressional intent." *U. S.* v. *Barnes,* 222 U. S. 513."

The Civil Aeronautics Act clearly provides for the power to suspend in addition to the power to issue temporary certificates; whatever duplication of function may be involved is not material.

II. THE CIVIL AERONAUTICS BOARD PROPERLY EXERCISED ITS POWER TO SUSPEND IN THE CASE BROUGHT HERE FOR REVIEW.

In the order of the Civil Aeronautics Board brought here for review the Respondent made the following finding:

> "We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, i.e., on December 31, 1952, when Bononza's certificate formally expires. However, it is possible that Bonanza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. Accordingly, Western's authority to serve El Centro and Yuma will be suspended up to and including December 31, 1952, or until final determination by the Board of a timely application by Bonanza for renewal of Segment No. 2 of its route No. 105, whichever shall last occur."

Petitioner has argued that the term of the suspension is so indefinite as to be the equivalent of a permanent revocation, which could be ordered only after an intentional violation of the Act, which was not here the case. While it is true that the time during which the suspension will operate has not and can not at this date be exactly determined, the standard by which its duration may

be measured proves that as of the date of Respondent's order the suspension was and could have been only temporary in nature.

A complete answer to Petitioner's objection in this respect is found in the fact that the Board does have statutory authority to "modify" a permanent certificate by *permanently eliminating* therefrom a point or points if such elimination is required by the public convenience and necessity. See: *Caribbean Area Case,* supra. That such a modification may from the carrier's point of view be equivalent to a "revocation in part" is immaterial. The very fact that Respondent did not exercise its power to modify under Section 401(h), but rather chose to suspend Petitioner at two designated points proves conclusively that the intention of the agency was to make Western's certificate temporarily inoperative in these respects in order that at a later date the agency might be able to alter the decision made.

III. THE SUSPENSION OF PETITIONER AT EL CENTRO AND YUMA DOES NOT INVOLVE A TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE CONSTITUTION.

A. General

Petitioner has argued that Section 401(h) of the Civil Aeronautics Act is unconstitutional, if this Court holds that Respondent has the right to suspend in part a permanent certificate of public convenience and necessity. The argument is advanced by Petitioner that it will not only lose the right to future profits at both El Centro and Yuma but will be forced to liquidate in an unsatisfactory market the investment it has made at the airport at both stations.

As a preliminary matter, the Court's attention is directed to the fact that Petitioner did not at any time raise a constitutional objection to the exercise of Respondent's statutory power to suspend its operation, even though an ample opportunity for such argument was given. Section 1006(a) of the Civil Aeronautical Act provides in part as follows:

> "No objection to an order of Authority (Board) should be questioned by the Court unless such objection shall have been urged by the Authority (Board) or if it was not so urged, unless there were reasonable grounds for failure to do so."

The recent case of *New England Air Express, Inc.* v. *Civil Aeronautics Board,* Case No. 11,274, App. D. C., decided February 21, 1952, is directly in point; cf. *Federal Power Commission* v. *Arizona Edison Co., Inc.,* CCA 9th, decided February 19, 1952.

B. Western Airlines Acquired No Property Rights Beyond the Terms of Its Certificate.

Sec. 401 (f) of the Civil Aeronautics Act provides in part as follows:

> ". . . there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require . . ."

Section 401 (g) of the Civil Aeronautics Act provides in part as follows:

> "Each certificate shall be effective from the dates provided therein and shall continue in effect until *suspended* or revoked as hereinafter provided . . ." (emphasis added)

The Supreme Court in the case of *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 84 L. Ed. 656 (1940), said:

> "No license was to be construed to create any right beyond the terms, conditions, and petition of the license, . . ."

Again in the case of *Ashbacker Radio Corporation* v. *Federal Communication Commission,* 326 U. S. 327, 90 L. Ed. 108 (1945) the Court stated:

> "Of course the Fetzer license, like any other license granted by the Commission, was subject to certain conditions which the Act imposes as a matter of law. We fully recognize that the Commission, as it said, is not precluded at a later date from taking any action which it may find will serve the public interest."

In the case of *L. B. Wilson* v. *Federal Communications Commission,* 170 F. 2d 793, 798 (App. D. C. 1948), the Court stated:

> ". . . a station license does not, under the Act, confer an unlimited or indefeasible property right . . . the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest."

No case has been found which purports to hold that the franchise of a public utility is not subject to the limitations of the statute under which it was issued. In the regulation and enforcement of such limitations, the government agency is not taking property without due process of law, even though its actions may restrict the use of the franchise and property acquired thereunder. In the case of *Rock Island Motor Interstate Company* v. *United States,* 90 F. Supp. 516 (D. C. Ill. 1949), the Court emphasized that the certificates to operate motor truck lines including "grandfather" rights are property of value and were entitled to constitutional protection. That proposition is not here denied. That Court was, however, careful to point out that there may be limitations on the extent of the property rights conferred by a certificate of public

convenience and necessity. At pages 521-522, the Court stated as follows:

> "Where, as here, the action of the Commission in the reopened proceedings results in material changes in the company's certificate and operating rights, and a revocation in whole or in part of such certificates and operating rights, the Commission's power so to act must be clearly evident from the statute . . . No such power is apparent from this record . . .".

In the leading case of *Santa Fe Pacific Railroad Company* v. *Lane,* 244 U. S. 492, 494, 61 L. Ed. 1275 (1917), the Supreme Court said:

> ". . . in view of . . . the reserved power to add to, alter, amend or repeal the granting act, no rights vested in the grantee within the meaning of the due process clause of the Fifth Amendment."

The following cases are to the same effect: *Greenwood* v. *Freight Co.,* 105 U. S. 13, 26 L. Ed. 961 (1881); *United States* v. *Birmingham Ferry Company,* 79, F. Supp. 569 (D.C. Ky. 1948); *Scheible* v. *Hogan,* 113 Ohio St. 83, 148 N. E. 581 (1925).

C. Respondent's Reserved Power to Suspend Petitioners Certificate is a Reasonable Limitation.

As discussed in the earlier portions of this brief, Sec. 401(h) clearly confers upon the Civil Aeronautics Board authority to suspend a certificate in whole or in part when such action is required by the public convenience and necessity. When Western Air Lines received its operating authority it knew, or should have known, that this limitation could be exercised at any time if the procedures and standards prescribed by the statute were followed. One of the few risks which the company and its stockholders took in this subsidized business (see Section 406 of the Act) was that its operating authority might in some man-

ner be diminished and that the company would suffer losses by reason of such action.[5]

The conclusion which may be drawn from this analysis is this: An act which imposes reasonable limitations and restrictions with relation to matters within the scope of the agency's authority does not violate the due process of law guaranty, although such restrictions interfere to some extent with the rights of private property.

IV. CONCLUSION

On the basis of the foregoing reasons the order of Respondent should be affirmed.

Respectfully submitted,

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April 4, 1952

[5] This problem is similar in many respects to the firmly established fact that the holder of a certificate of public convenience and necessity has no right to be free from competition. See: *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 43, L. Ed. 341 (1898); *Central Ill. Public Service Co.* v. *City of Bushnell*, 109 F. 2d 26, (CCA 6th 1940); *In re Inland Pipe Company*, 143 Kan. 820, 57 P. 2d 65 (1936).

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13245.

WESTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
BONANZA AIR LINES, INC., *Intervener*

BRIEF OF BONANZA AIR LINES, INC.

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BRIEF OF BONANZA AIR LINES, INC.

BASIS OF JURISDICTION.

1. Jurisdiction of the Civil Aeronautics Board.

The jurisdiction of the Civil Aeronautics Board to issue the order here under review is based on Sections 401(d)(2) and 401(h) of the Civil Aeronautics Act as amended (49 U.S.C. 481; 52 Stat. 987).

2. Jurisdiction of this Court.

Western's petition for a review of the Order of the Board was filed under Section 1006 of the Civil Aeronautics Act (49 U.S.C. 646; 52 Stat. 1024) and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009; 60 Stat. 243).

STATEMENT OF THE CASE.

In essence, the Civil Aeronautics Board's Order here under review (E-6040, dated January 17, 1952), did five things:

1. It denied Southwest Airways' amended application for an extension of its route from Los Angeles to Phoenix via San Diego, El Centro, Yuma and various other intermediate points.

2. It denied Petitioner, Western Air Lines, then possessing, *inter alia,* a Los Angeles-San Diego-El Centro-Yuma route, an extension from Yuma to Phoenix. This was the *fourth* time that the Board had found that the extension of Western to Phoenix was not in accord with the public convenience and necessity (see pp. 10-11 of Western's brief herein).

3. It suspended for a limited period of time Western's authority to serve *El Centro* and *Yuma.*

4. It suspended the authority of Frontier Air Lines (successor to Arizona Airways) to serve a Phoenix-Ajo-Yuma route.

5. It granted to Intervener, Bonanza Air Lines, a route extension from Phoenix to Long Beach and Los Angeles via Ajo, Blythe, Yuma, El Centro, San Diego, Oceanside and Santa Ana/Laguna Beach.

The area problem at which the Order here under review was directed had in one form or another been under consideration by the Board for nearly ten years.

Western's authority to serve El Centro was granted by the Board in 1943 (*T. W. A. et al., North-South California Case,* 4 C.A.B. 254). In 1946 the Board granted Western authority to serve Yuma (*Rocky Mountain States Service* case, 6 C.A.B. 695).

Arizona Airways, Inc., in February, 1948, was, among other things, authorized to provide service between Phoenix

and Yuma, via Ajo (*Arizona-New Mexico* case, 9 C.A.B. 85).

Western thereafter entered into an agreement with Arizona Airways whereby Western would transfer its Yuma-El Centro-San Diego route to Arizona, and in July 1948, filed an application with the Board for approval of such agreement (*Western-Arizona Agreement* case, Dkt. No. 3440).

Western then filed with the Board on March 16, 1949, an application to suspend its authority to serve Yuma and El Centro, i.e., to suspend its Yuma-El Centro-San Diego route. Western sought this suspension on the express ground that its service over that route was uneconomical (Dkt. No. 3768).

On June 15, 1949, the Board issued its opinion in the original *Additional California-Nevada Service* case, 10 C.A.B. 405. In that case there was in issue the question of a route from Los Angeles to San Diego and a route from Los Angeles to Phoenix, via a routing north of the route granted in the instant case. The Board deferred decision on that question for further consideration with the *Western-Arizona Agreement* case, *supra,* or until such time as the Board might determine final action thereon to be appropriate.

Within a short time thereafter it became apparent that Arizona Airways could not get its own routes activated and that Arizona would be unable to go through with its agreement with Western to purchase the latter's San Diego-El Centro-Yuma route.

Western then withdrew its application for Board approval of the Western-Arizona transfer agreement and also withdrew its application for suspension of its San Diego-El Centro-Yuma route authority. Not only did Western withdraw its suspension application but it again filed an application for extension of its San Diego-El Centro-Yuma route to Phoenix.

Subsequently, on December 19, 1949, and without further hearing, the Board issued a Supplemental Opinion in the *Additional California-Nevada Service* case (E-3727), awarding a route to Southwest Airways between Los Angeles and Phoenix by substantially the same intermediate points here in question, though the route granted was not the route for which Southwest had applied. Moreover, it granted the Western application for suspension at Yuma and El Centro, which application Western had prior to that time directed be withdrawn. It further directed Western to show cause why its service at El Centro and Yuma should not be suspended for as long as Southwest held authority to serve those points.

The award to Southwest, however, carried an effective date some several weeks into the future, and an express reservation by the Board of freedom to postpone it from time to time as may be deemed necessary. It was twice postponed while petitions for reconsideration, re-hearing and re-argument were being filed and considered. Ultimately, after considering various challenges to the validity of the order awarding the route to Southwest, those challenges being advanced primarily by Western, the Board on March 10, 1950, rescinded its Order awarding the route to Southwest. Its March 10 order (E-3975) set forth the Board's belief that the entire question of the need for local service between Los Angeles, San Diego and Phoenix could best be determined by contemporaneous consideration with the question of Western's application for extension from Yuma to Phoenix, the question of the need for Western's suspension at Yuma, El Centro, Palm Springs and San Bernardino, and the question of the need for the suspension of Arizona (later Frontier) at Yuma and Ajo.

The *Additional California-Nevada Service* case (Dkt. No. 2019 et al.; E-3727, dated December 19, 1949), insofar as it concerned Southwest's application for a Los Angeles-San Diego route, and for a Los Angeles-Phoenix route was then re-opened for further hearing (E-3975, dated March

10, 1950), Southwest was granted leave to amend its application so as to request also a route from San Diego to El Centro (so that its application would conform substantially to the route which the Board had earlier awarded to Southwest). The suspension dockets of Western and Arizona were consolidated therewith, as was Bonanza's application for a Los Angeles-San Diego-Phoeniz route (via various intermediate points—a route substantially the same as that ultimately awarded to Bonanza).

Thus, in a situation that had become highly complex and frought with innumerable legal and economic difficulties, the Board determined to make a fresh start and obtain a comprehensive, sound and equitable decision at the earliest possible date. It can fairly be said that as administrative proceedings of this type go, involving as they do complex economic and policy considerations, the *Re-opened Additional California-Nevada Service* case was processed expeditiously, beginning in May, 1950. Hearing on the case was completed in January 1951, and the Board's order here under review was rendered in January 1952, some 12 months later.

It should be noted in connection with Western's service to Yuma and El Centro that from early in 1947 until January 1950, shortly after the Board first proposed to suspend Western at those points, Western provided Yuma and El Centro with only *three* round-trips *weekly.* Moreover, Western admitted at the re-opened hearing in this case that it was only *after* and *because* of the Board's move to suspend Western at these points that Western increased its service there from *three* round-trips *weekly,* to two round-trips *daily*—for the express purpose of resisting the Board's suspension proposal. Its *thrice-weekly* service at Yuma and El Centro was therefore the pattern for about three years, although it had generated a substantial number of passengers at El Centro in 1946 when it inaugurated service and provided two round-trips daily (See Western's brief herein, Appendix "A", pp. 5-6).

The Board, after notice and hearing, ordered Western *suspended* for a *limited period of time* at Yuma and El Centro. The suspension in this instance is for a considerably shorter period of time than is customary. It runs until December 31, 1952, the expiration date of Bonanza's own original certificate, or until final determination of Bonanza's own certificate renewal application if timely filed, whichever date should be the later. As to the question of suspension there is no question of notice and hearing in issue.

In effect Western challenges the Board's action in taking Western out of the two cities in question, whether the action was permanent or temporary, and whether it was a revocation or suspension action Bonanza, intervener and recipient of the route award in this case, fully supports the authority and action of the Board with respect to all parties to the proceeding, and urges complete affirmance by this court of the Board's statutory authority and also urges an early lifting of the stay order entered herein. The Board of course actively defends its own order.

QUESTIONS INVOLVED.

The Board's action here under review is predicated primarily on Section 401(h) of the Civil Aeronautics Act. Section 401(h) of Title IV reads as follows:

> "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title, or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order

issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

Western's position is that the Board's order is invalid because it *revokes* rather than *suspends* Western's certificate at these points, and that the *revocation* requirements of the Act have not been complied with. Western argues further that even if the Board's action is deemed to be a suspension, a suspension cannot be ordered for the purpose of putting in another carrier. And lastly, they urge that there has been a violation of the Fifth Amendment of the Constitution—the prohibition against the taking of property without just compensation.

The Board's order directs Western's suspension for a limited period of time at Yuma and El Centro. It authorizes intervener Bonanza, for the same limited period of time, to render local service between Los Angeles/Long Beach on the one hand and Phoenix on the other, via the intermediate points Santa Ana/Laguna Beach, Oceanside, San Diego, El Centro, Yuma, Blythe and Ajo.

The principal questions are: (1) Whether the Board in fact *revoked* Western's authority at Yuma and El Centro? (2) If the Board so *revoked* Western's authority at these points, did it do so lawfully? (3) Did the Board in fact suspend petitioner's certificate for Yuma and El Centro for a limited period of time? (4) If it did so suspend petitioner's authority at those points, did it do so lawfully? (5) Did the Board's order deprive petitioner of any property rights without just compensation, in violation of the Fifth Amendment of the Constitution?

SUMMARY OF ARGUMENT.

1. The promotional, remedial and developmental purposes of the Civil Aeronautics Act, together with Section 401(h) of the Act, underlie, support and justify the Civil Aeronautics Board's suspension power and the manner in which the Board has here exercised such power, and an affirmance by this Court of that power and its exercise herein are necessary to the proper attainment of the objectives of the Civil Aeronautics Act.

2. The Board's order here under review does not *revoke* Western's authority to serve Yuma and El Centro.

3. The Board, after notice and hearing, and upon its own initiative, has the unequivocal statutory power to suspend a so-called permanent certificate, in whole or in part, for a limited period of time if, as found in this case, the public convenience and necessity so require.

4. The affirmance by this Court of the Board's order of suspension will not be conducive to instability in the air transportation industry.

5. Petitioner has not been deprived of its property without just compensation in violation of the Fifth Amendment of the Constitution.

ARGUMENT

1. The promotional, remedial and developmental purposes of the Civil Aeronautics Act, together with Section 401 (h) of the Act, underlie, support and justify the Civil Aeronautics Board's suspension power and the manner in which the Board has here exercised such power, and an affirmance by this Court of that power and its exercise herein are necessary to the proper attainment of the objectives of the Civil Aeronautics Act.

Petitioner's challenge of the Civil Aeronautics Board's suspension power has inherent in it a construction of the

statutory authority of the C.A.B. Under the provisions of Title IV of the Civil Aeronautics Act of 1938, (52 Stat. 973, (1938), as amended, 49 U. S. C. 401 *et seq.* (1946)) no air carrier may engage in air transportation unless there is in force a certificate of public convenience and necessity issued by the C.A.B. authorizing such service (Section 401 (a)). Certificates may be issued upon application after notice and hearing if the carrier is fit, willing and able to perform the service, and if the public convenience and necessity (the elements of which are set forth in Section 2 of the Act) require the service (Section 401 (b) (d).

Each such certificate shall be effective from the date specified therein, if issued for an *unlimited* period, and shall continue to be effective *until* "suspended or revoked" by the Board, or if issued for a temporary period, until the expiration date, unless sooner suspended or revoked (Section 401 (g)). Each such certificate must specify the terminal points and intermediate points which the air carrier is authorized to serve, and specify the nature of the service that is to be rendered thereunder (Section 401 (f)).

Section 401 (h) of the Act provides that the Board acting upon petition or complaint "or *upon its own initiative,* after notice and hearing, *may alter, amend, modify, or suspend* any such certificate, in whole or in part, *if the public convenience and necessity so require,* or *may revoke* any such certificate, in whole or in part, for intentional failure to comply with any provision [of the law]." Certificates may not be transferred (Section 401 (i)) nor abandoned (Section 401 (k)) without prior approval of the Board upon a finding that the public interest requires transfer or abandonment.

No merger, consolidation or acquisition of control may be achieved without prior Board approval (Section 408), and under Section 409 (a) interlocking relationships are outlawed unless approved by the Board upon a finding that such acts are not inconsistent with the public interest or adverse thereto. By virtue of Section 412, inter-carrier

agreements must be disapproved by the Board if they are adverse to the public interest, and Section 410 permits the Board to order a carrier to cease and desist from unfair methods of competition.

Certificates conferred by the Board give the carrier no proprietary, *property interest* or any exclusive right to use any air space (Section 401 (j)). Moreover, in the exercise of its functions under Title IV of the Act, the Board is authorized to establish from time to time such just and reasonable classifications of carriers or groups of carriers "as the nature of the services performed shall require." (Section 416 (a)).

In addition to its basic licensing functions under the Act, the Board is given authority over rates and charges to require that they be just and reasonable, and not unduly discriminatory (Section 403 *et seq.*).

Those then are the basic tools with which the Board was endowed by the Act to achieve the high purposes of the framers. They are the economic *means* by which the Board through regulatory control was enabled to achieve the public interest *end* in the development of an economically sound air transportation system. But as means to an end, it is essential that the end be recognized and understood in order that action taken to achieve that end may have meaning in its proper perspective.

In order to determine what the *end* envisioned by the Act was, it is not necessary to blow the dust off Congressional Records, or turn the yellowing pages of Committee reports. The framers of the Act spelled out in very precise terms what the end was to be—what was the *raison d'etre* for the regulatory powers given the newly created Board. Their purpose and their end is set forth in Section 2 of the Act which is entitled "Declaration of Policy" and it is from that section that we are able to glean purpose and meaning for the *tools* granted the Board. Now just what was this C.A.B. created to do? Section 2 states that the public convenience and necessity for whose interest and

protection the Act was adopted *shall be deemed to include,* among other things, *the following:*

(a) The encouragement and development of an air transportation *system* properly adapted to the *present and future* needs of the . . . commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to *recognize and preserve the inherent advantages of,* assure the highest degree of safety in, and *foster sound economic conditions in,* such air transportation, and to improve relations between, and *coordinate* transportation by, air carriers;

(c) To promote *adequate, economical* and *efficient service* by air carriers.

(d) To permit competition *"to the extent necessary"* to assure the *sound* development of an air transportation *system* properly adapted to the nation's commercial, postal and defense needs;

(e) The regulation of air commerce in such manner as to best promote its development.

It is patently clear that such worthwhile objectives could not be achieved by maintaining the *status quo* at any given point or any given time, recognizing that the Board was charged with the duty to "develop", "promote", "protect" and, in juxtaposition, to *"regulate"* in order to develop, promote and protect. It was charged with the duty to *regulate* for the purpose of preserving the inherent advantages of air transportation, just as other regulatory bodies have been charged with the duty of recognizing the inherent advantages of highway and/or rail service. (See *e.g.,* National Transportation Policy announced in the 1940 Amendments to the Interstate Commerce Act, 54 Stat. 899, amending 49 Stat. 543, 49 U. S. C. 301 (1946)). It was

charged with the duty to *regulate* to develop a *system* that was *economically sound,* and responsive to *the present and future* needs of the nation's commerce, postal service and defense. It was charged with the duty to *regulate* to assure that the service was *efficient* and *adequate,* and to insure its *development.*

Judicial recognition of this power to regulate to achieve the ends set forth in the Declaration of Policy is expressed in *American Airlines* v. *C.A.B.,* 192 F.(2d) 417 (D.C. Cir. 1951). That Court in discussing the propriety of a reliance on policy determinations under Section 2 of the Act said:

> "In the first place, Congress expressly directed that the Board consider, as being in the public interest and in accordance with the public convenience and necessity, the development, encouragement and promotion of air transportation. . . . Whatever belittling significance may be attached to the fact that those provisions were under a title 'Declaration of Policy,' they are in the statute, are peremptory, and are as much an enactment by the Congress as is any other section of the statute. * * * In the second place, the regulatory function, certainly insofar as it includes permissive certificates, is a forward-looking function, as any examination of regulatory measures easily demonstrates. In that respect it differs markedly from a purely judicial or quasi-judicial determination of present or past rights. Much confusion has crept into the subject by failure to observe that distinction."

In the light of those conditions, it cannot be supposed that the Board was set up merely to function in the capacity of licensor, and having exercised that function, to become sterile. On the contrary, when the framers of the Act had agreed upon the end to be achieved, they set about to arm the newly created authority with the tools, the means to achieve that end, and they did so in no uncertain terms. But they were not unjust in their demands; they gave as well as took, and the balance they agreed upon was struck in a revolutionary statute, one unparalleled in the

history of public utility regulation in this country. An appreciation and an understanding of how that balance was struck is essential to an intelligent determination of the problem posed in this case.

There is no need here to recount the economic conditions that existed in air transportation before the adoption of the Civil Aeronautics Act. In that sense, the past *is* prologue, but the fact remains that conditions were so chaotic that the industry itself begged for help and protection. The Civil Aeronautics Act was no offspring of the so-called New Deal "brain trust"; it was the result of hard felt necessity for federal aid and federal protection to a young and promising industry. It was no depression panacea conjured up in confusion and imposed upon an unwilling but helpless group. The Civil Aeronautics Act was the product of a cooperative movement between government and industry in the mutual recognition that the business was peculiarly one affected with the public interest, and one that ought to be assured against the chaos and disaster of cut-throat competition and inadequate or inefficient service on the one hand, and inadequate or inefficient financing on the other. The result of this cooperative movement was the adoption of the Act which in return for the bounty and protection given, required the industry to continue to cooperate toward the achievement of the goals set. But recognizing that future generations might reject any notion of being governed from the grave, the Act was drafted to give the Board the authority to force, if necessary, continued cooperation to achieve the ends set forth in the Act, and even that authority was not demanded without necessity nor required without concession.

As we have seen, Title IV of the Act gives the Board the necessary tools to carry out the declaration of policy of the Act. That is the regulatory side of the coin, the teeth, as it were, to assure that the purposes of the Act would not be frustrated by recalcitrant benefactors. But the other side of the coin represents what the government gave, in exchange, for the authority to regulate *in futuro*.

Title IV of the Act, in addition to its regulatory features contains provisions of bounty rarely if ever found in public utility law. Under those provisions by which carriers serve among other things the postal needs of the country, they are entitled to receive "reasonable compensation" for such service (Section 401(m)). And in determining what shall be reasonable compensation for such mail service, the Act departs from a new springboard; the carrier is not merely paid the *reasonable cost* of transporting the mail, but is paid under the standards established in Section 406 (b) of the Act, the significant ones for our purposes being that in fixing and determining the fair and reasonable rate of a compensation, the Board may fix different rates for different carriers and different classes of carriers, and in determining the rate in such case must take into consideration, *inter alia, "the need* of each such carrier for compensation . . . sufficient to insure the performance of such service, and, together with all other revenues of the air carrier, to enable such carrier under honest, economical, and efficient management, to maintain and continue *the development of air transportation to the extent and of the character and quality required for the commerce . . ., the Postal Service, and the national defense."* By that provision the government undertook one of the most gigantic underwriting programs in history to that date. It issued to the carriers, subject to the terms, conditions and limitations of the Act, a federal insurance policy whose yearly dividends have been as high as 112 million dollars or more, at least 40 to 60 per cent of which is said to be sheer subsidy. (See, *e.g.*, Johnson, Sen. Edwin C., *Proposed Senate Action on Air Mail Subsidies,* 17 J. Air L. & Com. 253 (1950)).

That it was neither the intent of the Act nor the purpose of the Board to underwrite and thereafter perpetuate air service that is not *wholly responsive* to the public convenience and necessity as defined in Section 2 of the Act is too obvious to argue. The Board recognizes that fact and the industry recognizes it. President Eddie Rickenbacker of

Eastern Airlines underscored the industry acceptance of the notion that in order to be justified the service must be required by the public convenience and necessity and operated in accordance with sound economics. "A tragic error which has been committed . . . has been the assumption that . . . the mail pay section—of the act ha[s] set air transportation apart . . . and ha[s] made it immune to the grim necessities of sound business practices and ha[s] promised it a blank check and ha[s] guaranteed each air carrier a livelihood at the expense of the taxpayers." (*Airline Industry Investigation,* Hearings pursuant to S. Res. 50 before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Cong., 1st and 2d Sess. (April 11, 1949-Jan. 31, 1950) at p. 1112).

The plain facts are that the Board in determining what services are required by the public convenience and necessity as defined by Section 2 of the Act has a very clear duty under the Act to protect the United States Treasury from undue and unnecessary burdens and to insure that the monies spent out of that Treasury produce the maximum public benefit. In discharging that duty, the Board has the authority under the Act to certificate service and to continue such service under a certificate *only* so long as the public convenience and necessity require it. It would be violative of the Board's duty under the Act to permit or continue a service that was either unjustifiably uneconomic or not responsive to public need, or which did not preserve the inherent advantages of air transportation and contribute to its development, its soundness, its adequacy and efficiency.

The Board, in the exercise of its powers under Title IV is required to supervise on a *continuing basis* the services that are performed to insure that they are responsive to the requirements of the public interest. When facts are presented to the Board which show, under the public convenience and necessity tests set-forth in Section 2, that the service of a carrier is no longer required it is the

Board's statutory duty, at least for an experimental period, to re-arrange the route pattern to the extent necessary to suit the requirements as they are then shown to exist. Section 401 (h) of the Act provides the Board with authority to take just such action.

Were it otherwise, this would be an anomalous purse without purse-strings and although Shakespeare said "He who steals my purse steals trash," one would suppose that the purse there concerned was something less in stature than the federal treasury. Congress, the Board and the industry itself have grave public responsibilities under this Act. Unless we are to abandon all concepts of public morality, not to mention all concepts of legality, the right of the Board to take the action here complained of must be upheld.

The basic balance between what the government gave and what it demanded is thus reflected in the Act's various provisions. Section 401 (h) merely insures that the balance will be maintained. Under previous regulatory acts where the subsidy provisions were not present, it was safe to assume that whenever an amendment or an alteration was necessary in the basic certificate for economic reasons, that is, necessary because of a change in the requirements of the public convenience and necessity which was reflected unfavorably in the carrier's earnings or financial position, that the carrier would apply to the regulatory agency for the necessary relief. Under those conditions, statutes which permit alteration, modification or suspension of a certificate "upon the application of the holder," as the Motor Carrier Act does for example, were adequate to protect both the carrier on the one hand and the public interest on the other. The carrier was protected by virtue of his right to make application for a change in his certificate which he would unquestionably do if the conditions made the service in question economically unjustifiable, and the public interest was protected by the authority of the Commission to grant or deny the relief requested.

But the instinctive motivating factors which move the carrier to act on its own motion in the absence of subsidy provisions to fall back on are not present once a protective subsidy provision comes into play. Then by virtue of the guarantee against losses, the carrier has no incentive to correct uneconomic conditions under the certificate; he is for all practical purposes *insured* against loss, so the public interest plays little if any part in the carrier route program considerations.

Under those circumstances unless the regulatory authority is empowered to act on its own initiative *to correct* or *prevent* uneconomic conditions or to *correct* or *prevent* inadequacies or inefficiencies in service under the certificate, then the cost to the government is beyond practical control, and the requirements of the public convenience and necessity are ignored. It was to avoid or to cure just such a situation that Section 401 (h) was put into the Civil Aeronautics Act and it was because such a situation was wholly unlikely to arise without the existence of the subsidy provision that no similar authority is found in other federal regulatory Acts.

It is no answer to claim as Petitioner does that it no longer requires government subsidy and that it therefore should in effect be free of government supervision and direction. In the first place it is highly questionable whether Petitioner is in fact now operating without direct government subsidy. In the second place it is an indisputable fact that Petitioner is and will be for many years to come the beneficiary of millions of dollars in federal funds spent on airways, airports and numerous other direct and indirect services and facilities. Thirdly, as Petitioner well knows, if tomorrow should bring a sudden shift in the new rising economic current in which the nation is moving as it well may do, Petitioner would be one of the first to fall back on the subsidy guarantee provisions of the Act and would be entitled to be made whole from the date on which its mail rate adjustment petition was *filed* with the Board.

Moreover, it will be readily apparent to the court that even if Petitioner has at last in fact, and at least for the moment, obtained a *so-called* self-sufficient status, Petitioner was literally carried to that highly desirable status on the largess and bounty of the American people. For at least fourteen years, and more likely twenty, petitioner's survival and growth have been almost wholly dependent upon direct subsidies provided by the American taxpayer. No one can deny that without those subsidies petitioner would be non-existent today.

The obvious fact that obviously is not apparent to petitioner is that those subsidies were provided for the interim and ultimate benefit of the public interest. Petitioner has been nourished, fattened and sustained by the largess of the U. S. public through many years, each of which would otherwise have been a year of economic annihilation for petitioner, for the sole purpose of maintaining petitioner in the position where it could best serve the *public need,* whatever that need may be from time to time. The public need, not the carrier's selfish interest, has been, is and always will be the controlling determination. That is the sole purpose for which petitioner today exists, whether petitioner is today subsidized or not. And it is not up to petitioner to determine what that public need may be from time to time. That function has been lodged exclusively in the hands of the Civil Aeronautics Board, together with the instruments and power to give full force and effect to determinations made for the public benefit.

The public need, insofar as air transportation is concerned, has not yet crystallized into a fixed and inflexible pattern. In this stage of the development of an air transportation system the requirements of the public convenience and necessity are still being sounded and measured. The Board has not only the power to maintain a continuing examination and study of the public need but it has a direct obligation to do so. And it clearly has both the responsibility and power to see that the requirements of the

public convenience and necessity, as determined by the Board, from time to time, receive maximum satisfaction from the air transportation system of this country. It is the Board's job to determine those requirements and to mold and work and knead the air transport pattern into optimum conformity with such requirements.

Section 401(h) of the Act, authorizing the Board to take the initiative and, after notice and hearing, to alter, amend, modify or suspend any certificate, in whole or in part, if the public convenience and necessity so require, is an instrument of construction expressly designed for that purpose. It is an instrument without which the basic purposes and objectives of the Civil Aeronautics Act would be rendered a nullity.

Every air carrier accepts its certificate subject to the paramount interest of the public. It accepts it with full knowledge that its own private interests must be subservient to the needs of the public. It accepts an expressly limited, clearly qualified authority. Irrespective of whether or not it has laid claim to the subsidy benefits of the Act, the Federal Treasury stands behind it as a virtual guarantor of the carrier's survival. In return for this insurance policy and innumerable other protective benefits to which it is entitled under this developmental statute, the carrier assumes, among other things, the obligation to submit its services and its pattern to such adaptation as is required by the public convenience and necessity, as found by the Civil Aeronautics Board to exist. If the public interest is found to require a limited suspension of a carrier's services at certain points, then under the obligations which the carrier has assumed under this Act and under the limiting qualifications with which its certificate was granted and accepted by it, the carrier's private interests must yield to the overriding public interest.

That such a limited suspension can be undertaken under the provisions of Section 401(h) cannot really be seriously questioned. Petitioner itself has recognized the validity of

the suspension provision of Section 401(h), at least insofar as that section authorizes the issuance of a suspension order upon *petition* of the carrier suspended. As previously indicated, petitioner itself in 1949 petitioned the Board pursuant to Section 401(h) for a suspension of its service at the very points here involved, Yuma and El Centro. In the face of the clear and unambiguous language of Section 401(h) it is impossible to conceive that any serious consideration can be given to an argument that 401(h) authorizes suspension, but only when such suspension is sought by the carrier. The provision regarding suspension plainly states that the Board may order it "upon petition or complaint or *upon its own initiative*" (italics added).

The public interest may require suspension for any number of reasons. One of these may be the need for an experimental service of a different type performed by a different type of carrier serving a different type of market. It may also be required in the interests of strengthening the air route pattern by strengthening its constituent elements. These considerations were all present in this case. The route in question is sufficiently strong to constitute a strengthening of Bonanza's present route pattern. On the other hand, that part of it which is possessed by petitioner is weak compared to the rest of petitioner's system and hence constitutes a weakening element in petitioner's overall route structure. The type of service required by the communities in question and the willingness and ability of the two carriers (petitioner and Bonanza) to provide that service, considered, against the backdrop of the nature, character and experience of each carrier, were also important and proper considerations in weighing the question of the requirements of the public convenience and necessity.

It is clear under the Act that service which is required by the commerce, the Postal Service or the national defense may be certificated and continued at least on an experimental basis. The development of a system properly

adapted to the "*present and future*" needs of the nation, as well as the preservation and recognition of the "inherent advantages of air transportation" may, and often has been found to justify service that admittedly is not self-sufficient initially. That the framers of the Act understood conditions and foresaw the circumstances is obvious from a reading of the Act. The Board is expressly authorized to classify carriers from time to time in accordance with the nature of the service performed and the extent of that service (Section 416 (a)) and is authorized in the establishment of rates of compensation under section 406 (b) to take account of such classifications in determining the rate that shall be applied. There can be no doubt that the "need" of the carrier may well reflect to a large extent the nature of his services and the extent to which they are operated, and facts which authorize classifications of carriers under Section 416(a) are apposite under 406(b) in determining rates of compensation for mail service. Thus if the Board were to find that because of the nature of the service required, the public convenience and necessity required the service by a carrier of one class rather than by a carrier of another class, it would be perfectly justified in transferring for a limited period at least the authority to operate the service to the carrier in the suitable class, even though the cost to the government is greater. Cost is but one of the considerations entering into the question of public convenience and necessity.

The test in every case is the public convenience and necessity as defined in the Declaration of Policy in Section 2 of the Act, and not the interest of a particular carrier. If it were otherwise, the development of an air transportation properly adopted to our needs, present and future, would be seriously hampered, contrary to the intent of the Act, and the ultimate result would be to transfer outright the public utility regulatory functions from the Board where they were vested by Congress to the carriers for private gain. That such a result was ever intended is inconceivable.

It is clear therefore that whatever else may be said of the powers of the Civil Aeronautics Board, it was expressly given the authority to maintain the paramount public convenience and necessity according to the dictates of its requirements from time to time; and that its actions in the discharge of that authority are governed only by the express limitations contained in the Act on the one hand and the knowledge of and experience with the requirements of commerce, the Postal Service and the national defense on the other. Congress defined a broad area in which the Board was to function, and it expressly gave the Board authority to meet the changing needs of the public convenience and necessity. The dynamics of air transportation in 1938, the potential envisioned, and the policy declared by the framers preclude any belief that the Board was conceived in a legal strait-jacket that would inhibit the discharge of its future duties when the dictates of the public interest required further action looking to the existing and future needs of commerce, the Postal Service and the national defense.

2. The Board's order hereunder reviewed does not revoke Western's authority to serve Yuma and El Centro.

Petitioner contends that the Board's suspension order is tantamount to *revocation,* and that since a certificate may not be *revoked* except for intentional and continued violation of the law (Section 401 (h)) the action taken by the Board here is invalid.

Aside from the fact that such a contention flies in the face of the express language of the statute, it seeks to expand the scope of the issues in this proceeding far beyond what they actually are, and to lull the Court into deciding legal questions not here presented, in anticipation of events which *may* or *may not* come about. It is essential that the Court know what this case is *not.* It is *not* a revocation; it is *not* an amendment or a modification of a certificate; it is *not* a permanent suspension. Neither the legal basis for, nor the propriety of, any of those actions is therefore before the Court.

In their ordinary and most acceptable definitions, the terms of Section 401 (h) of the Act may be classified into two types of authorization. On the one hand, the introductory sentence to 401 (h) which gives the Board the power, *on its own initiative* to *alter, amend, modify* or *suspend* a certificate, in whole or in part, if the public convenience and necessity so require, establishes an *economic sanction,* to be employed *according to the requirements of the public interest.* The second part of that provision authorizes the Board to *revoke* a certificate, in whole or in part, for intentional and continued failure to obey the law: that provision is a *penal* function. Its intent and purpose is in no way a limitation on the Board's *economic* control power to alter, amend, modify or suspend in the public interest; the intent of the second part clearly is to deter violation of the law. One is clearly a *constructive* measure; the other a *destructive* measure. This has been the Board's interpretation of the Act from the very beginning, and it is the only defensible interpretation that may be given the two provisions. (See, *e.g., Caribbean Area Case,* 9 C.A.B 534, 545-554 (1941); *All American Airways, Inc., Suspension Case,* 10 C.A.B. 24, 27-28; *Frontier Renewal Case,* Docket No. 4340, Order Ser. No. E-5702, Sept. 14, 1951; *Wisconsin Renewal Case,* Docket No. 4387, Order Ser. No. E-5951, Dec. 13, 1951; *North Central Route Investigation,* Docket No. 4603 *et al.,* Order Ser. No. E-5952, Dec. 13, 1951.).

Petitioner concedes that the word "suspension" implies something temporary, i.e., not permanent. But his argument is simply that the Board suspension Order is not in fact a suspension but a revocation. This contention is based primarily on petitioner's position that certain statements and actions by the Board must be construed as showing that the Board's Order in question is intended to remove Western permanently from these two communities.

One such instance relied on is language in the Board opinion accompanying the Order under review, where the Board found that local air service for the Los Angeles-

Phoenix route was required by the public convenience and necessity, and that in view of the Board's well-established policies with respect to the selection of carriers to operate local service air routes and the Board's responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, Bonanza was selected as the carrier to be authorized to provide the required local service.

The Board then said that those were factors supporting its conclusion that "the transportation needs of El Centro and Yuma will, in the *long run,* be better served by a local carrier than by a trunk." (Italics supplied)

In terms of the perpetual life of a corporation it would be reasonable to conclude that a suspension of part of its activities for a period of five or six years or thereabout clearly would not be tantamount to a revocation. If the period of suspension is limited in time and the period is within the bounds of reason, the action is unquestionably temporary. Of course, if a suspension is extended and extended and extended, *ad infinitum,* it can eventually constitute revocation. But such is not the case here, and there is no reasonable likelihood that such a situation will ever arise.

Air transportation is far too fluid at this stage in its development to be susceptible to accurate forecasting. And certainly it is wholly improper to attempt to construe the purpose and effect of a current order in the light of something which may or may not ever come to pass in the future.

It is of course possible that the Board might some day take such action as would constitute revocation. When and if such an action is taken, petitioner will be fully entitled to challenge its validity. But not until such time does he have any standing to be heard. He cannot attack as invalid that which does not exist merely because he chooses to believe that ultimately it will.

Petitioner's fear or fancy as to what may ultimately evolve in this picture, based on language that *could* foretell some *future* action amounting to revocation, but may, in

fact, be wholly meaningless as the facts develop, can provide no proper basis for a construction of an order that is on its face clearly temporary.

Assuming for the sake of argument that the period of suspension in question is five years and that suspension for such a limited period could reasonably be considered temporary, the court must must full well realize that there are a number of different things that could transpire at the close of that period, any one of which would patently demonstrate that petitioner's argument of today is wholly unsound and unwarranted. Bearing in mind that air transportation will undoubtedly go through several more widely varied stages of development and progress before it begins to level off, it is not at all unlikely that Western itself some five years from now will find that service by it to Yuma and El Centro will be wholly incompatable with its then existing system. Western's principal profit-bearing routes are especially suitable for large, high-speed, high-altitude aircraft. That feature may very likely characterize its whole system five years hence.

It is also quite possible that in five years from now the traffic at Yuma and El Centro may be developed to the point where two different types of service by two different types of carrier would be warranted.

There is also the very distinct possibility that the Board in the light of circumstances then existing would determine that the cities in question should no longer be served by a local service carrier.

Nor is it impossible to imagine that within the span of five years Western could have, by merger, acquisition or otherwise, succeeded to the operating authority of the local service carrier in that area, rendering the question entirely moot, or that Western itself could have become merged into another carrier which would have no interest in serving Yuma and El Centro.

So it can readily be seen that a temporary suspension today does not in any sense foretell a revocation attempt

by the Board at some distant future date and certainly cannot be construed as a revocation *in futuro*.

The Board action on which petitioner relies most heavily, however, in support of its allegation that the suspension order is in fact a revocation order, is an order (E-6041) by the Board, issued on the same date as the order here under review, directing the institution of an investigation *to determine whether the integration of the routes of Southwest and Bonanza* (touching by virtue of the Board order here subject to review) *into a single unified route system* by means of merger, consolidation, acquisition of control, route transfer or in any other lawful manner *would be in the public interest* and in accordance with the public convenience and necessity as defined in Section 2 of the Act.

Viewed dispassionately this order is obviously no more than an *inquiry* "to determine whether the integration of the route . . . would [or would not] be in the public interest". Such a proceeding is in no sense definitive and cannot result in an order directing such an integration. The proceeding is merely exploratory, *not* adjudicatory. Whether or not a formal merger proceeding under Section 408 of the Act would spring from such an investigation would depend in part upon the evidence brought out in such a proceeding. And, if a formal merger proceeding were to be started subsequent to the close of the investigation, whether or not a merger proceeding would culminate in a merger certainly no one can say, unless, like Western, they are disposed to charge that the Board has in effect already pre-judged such a proceeding.

Moreover, and this should be of particular interest to the court, the Board has no statutory authority to order a merger. The Board's power with respect to mergers is derived from Section 408 of the Act, and is subject to the requirement that an *application* for merger, consolidation, acquisition of control, etc., must be submitted to the Board for approval, and a public hearing must be held thereon.

The Board's power in this respect does not therefore come into being until an applicaion is submitted for its approval. The statute does not confer any authority on the Board to initiate a merger proceeding. Thus, in effect, the Board has only a ratification power and a veto power with respect to mergers, consolidations, etc.

But in any event, *if* there were to be an adjudicatory merger proceeding, and *if* the Board were to approve a merger of Bonanza and Southwest, and *if* such order of approval were to be deemed effectively to constitute a revocation of Western's authority to serve Yuma and El Centro, Western's cause of action against the Board for unlawful revocation would arise at that time, but it plainly does not exist now. Such cause as it claims now is purely illusory; it is conjecture based upon surmise based upon supposition.

3. The Board, after notice and hearing, and upon its own initiative, has the unequivocal statutory power to suspend a so-called permanent certificate, in whole or in part, for a limited period of time if, as found in this case, the public convenience and necessity so require.

This case actually presents a narrow and simple legal question; it is this: Does the Board, upon a finding that the public convenience and necessity so require, have the power to *temporarily* suspend a certificate of public convenience and necessity which has been previously granted to the carrier for an indefinite period? That is the real legal issue here; reasons for and against suspension should not be confused with the legal issue, as such reasons are matters that are weighed in the balance in determining the requirements of the public convenience and necessity. Once these are found to require suspension, you then have the purely legal question concerning the *power* of the Board to suspend, in whole or in part, for a limited period of time an indefinite or so-called permanent certificate authority.

The public need in a particular area for another type service by another type carrier than presently afforded,

when the area in question will not currently warrant service by two carriers, can unquestionably be a proper basis for a finding that the public convenience and necessity require the limited suspension of the carrier then serving only a part of that area. This was not of course the sole basis for the Board's findings as to the requirements of the public convenience and necessity. But assuming for the moment, for the sake of argument, that it was, the legal question before the court is whether the Board has power to suspend *if* the public convenience and necessity are found to require suspension. But beyond that, and it clearly passes from the legal question to a question of the substantial evidence rule, would be whether or not a finding that the public convenience and necessity require suspension of petitioner's services at these two communities is supported by substantial evidence. This clearly involves the court's narrow and self-limited power to review such a determination, a power based on the "substantial evidence rule" (see, Netterville, *The Administrative Procedure Act: A Study in Interpretation,* 20 Geo. Wash. L. Rev. 1 (1951)).

It is obvious, however, from the Board's opinion and order in this case that the Board's finding that the public convenience and necessity require suspension of petitioner's services at Yuma and El Centro is based on a number of factors that enter into the Board's expert judgment as to the requirements of the public interest. Such factors include but are not limited to: (1) the fact that the new service to be authorized was of a local-service nature; (2) the Board's well-established policy that local service should be provided by so-called local service carriers specializing in and devoting all their attention to that type of service; (3) the route found to be required by the public convenience and necessity involved a number of points other than the two suspension cities of Yuma and El Centro; (4) the Yuma and El Centro traffic is presently insufficient to justify service by two carriers; (5) Yuma and El Centro were found to require a local-type service which could best be provided

by a local service carrier; (6) Western's history of operations at Yuma and El Centro showed a blatant disregard for their public interest obligations to those communities (see pages 56-59 incl. of Appendix "A" of Western's brief to this court) (7) Western's history of operations at Yuma and El Centro reflected a marked lack of interest in the development of traffic at those communities; (8) Western's show of renewed interest in providing proper service to those communities apparently stemmed from ulterior motives wholly unrelated to the needs of those communities and Western's obligation to meet those needs; (9) Western has represented to the Board that it cannot operate its San Diego-El Centro-Yuma segment on an economical basis unless it is granted an extension from Yuma to Phoenix; in connection with Western's present claim that it is *now* operating at Yuma and El Centro at a profit the court should bear in mind that the winter months are the *peak* traffic months in that area; that the question of whether a part of a much larger operation is profitable or not involves some highly intricate and very debatable matters such as the proper allocation of indirect costs or overhead; and that most domestic carriers are now experiencing substantial traffic increases directly attributable to the present tempo of the war economy, increases which may one day soon dissolve as suddenly as they came into being; (10) suspension of Western at these two points is in furtherance of the Board's efforts to strengthen the financial and operating structure of the trunk-lines by removing some of the small intermediate points that are marginal in terms of profit, and thereby generally extending the average length of haul and average length of flight, thus enabling the carriers to concentrate on the long-haul, high density traffic—the kind of traffic which their large, high speed, high altitude aircraft, are ideally suited to serve at a maximum economy and profit to the carrier; (11) the award to Bonanza will substantially improve that carrier's efficiency, economy and service; and (12) the suspension of Western and the award to Bonanza

will strengthen and improve the air transport pattern and service in the area in question.

The action here taken by the Board in ordering a temporary suspension of a certificate is, of any of its *authorized* powers, the furthest removed from revocation. The power to suspend is the lesser of the powers which the Board may exercise in the requirements of the public convenience and necessity; it may also alter, amend or modify. There is little likelihood that petitioner could successfully challenge even the exercise of those broader authorities which have inherent in them no such element of the temporary as does the term "suspension". The Board has properly considered suspension to connote a temporary action (See, *Caribbean Area Case, supra*) but alteration, amendment or modification have no such temporary connotation. Since the Act plainly authorizes those broader and more permanent powers, the restraint exercised by the Board in employing the lesser authority of suspension is indicative of the non-permanent nature of the action here taken.

The Board's power of suspension was clearly recognized by the President's Air Policy Commission and a more effective use of that power to enhance the careful development and planning of a sound national route pattern was strongly urged by the Commission. It urged a comprehensive survey by the Board and the development of a more cohesive policy, saying:

> "As part of such review, if the Board should find any routes no longer now required by public convenience and necessity, *it should use any present legal powers* such as *suspension* or reduction of 'need' payments *to reduce the effect of any errors in the present system.* This appears *preferable* to causing instability in the industry through granting to the Board the right of *outright revocation* of routes." (Italics added.) *Survival In the Air Age,* p. 111, January 1, 1948.

There is no real ambiguity in the language of Section 401 (h), but in order to demonstrate as conclusively as

possible to the Court the utter impropriety of petitioner's contention, reference may be made to prior case law under other Acts and the legislative history of the Civil Aeronautics Act, which clearly and unequivocally stand as a bulwark against petitioner's construction of the Act.

In essence, petitioner's contention is that the power to suspend a certificate in any respect or in any manner possessed by the Civil Aeronautics Board must be interpreted in accordance, *not* with the language of the Civil Aeronautics Act, but in accord with the provisions of the *Motor Carrier Act* which provides that no certificate may be suspended or revoked except 1) upon application of the holder, or 2) for intentional and continued violation of that Act. (Part II of the Interstate Commerce Act, 49 Stat. 543, as amended 54 Stat. 919, 49 U. S. C. 312 (1946). But under that Act, the I. C. C. has no authority to take action "on its own initiative" as the C.A.B. has under Section 401 (h) of the Civil Aeronautics Act; the I. C. C. has no authority to amend, alter, suspend or modify a certificate *except upon application from the holder.* In the absence of such an application, a certificate once issued is, with certain qualifications (see, *e.g., United States* v. *Rock Island Motor Transport Co.,* 340 U. S. 419 (1951); *United States* v. *Texas and Pacific Motor Transport Co.,* 340 U. S. 450 (1951)) inviolate except by revocation under the very terms of the statute.

Under the terms of the Water Carrier Act (Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. 901 *et seq.* (1946)) the I. C. C. has no power *whatsoever* to alter a certificate, and has *no power to revoke* a certificate on any ground so far as the statute reads. The United States Supreme Court expressly held that the I. C. C. could not *alter* a certificate granted under that Act *in the absence of statutory authority.* (*United States* v. *Seatrain Lines,* 329 U. S. 424 (1947)). But there is nothing in the *Seatrain* case apposite here. There was *simply no statutory authority* even for revocation of the water carrier certificate,

or for that matter, for any alteration whatsoever. The *Seatrain* case therefore stands for the proposition that the I. C. C. in the absence of *any* statutory authority, may not alter, amend, suspend or revoke the certificate of a water carrier under any circumstances known to date. But if we carry the development of the law on the subject one step further and examine the authority of the I. C. C. to alter or amend a certificate of a Motor Carrier, it is clear that even with statutory authority which on its face would appear to exclude any but penal action by the I. C. C., *a declared policy of Congress to preserve the inherent advantages* of motor transportation as against rail transportation, *plus a reservation clause in the certificate,* gave the I. C. C. the power to alter and amend a certificate *beyond* the express terms of the statute. (*United States* v. *Rock Island Motor Transit Co., supra.*) That case alone would be substantial authority for the Board's action here, both by reason of *the Congressional declaration of policy in Section 2 of the Civil Aeronautics Act and by reason of the Board's reservation clause contained in every certificate* which provides in essence that the privileges granted by the certificate "shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board." The *Rock Island* case was a 5 to 4 decision by the Court, and required that the Supreme Court find authority in such a reservation clause to make *substantial* alterations in the authority granted, even though there was *no express statutory authority* for such alterations. But this Court is not called upon to "stretch a point." The Civil Aeronautics Act of 1938 cured the short-comings of the Motor Carrier Act of 1935 and *expressly* gave the Board the power to amend, alter, modify or suspend a certificate whenever the requirements of the public convenience and necessity show the need for such action. Neither the Civil Aeronautics Board nor this Court need rely on any reservation clause in the certificates themselves. The "Achilles heel" in these

certificates exists by virtue of the statute under which they were conferred and they must yield to the prevailing requirements of the public convenience and necessity.

Not even some public *advantage* in the certificate as it exists is sufficient to hold back the I. C. C.'s authority to alter a certificate if otherwise necessary. In *I. C. C.* v. *Parker* (326 U.S. 60), upon which the Court relied in part in the *Rock Island* case, the Court said "If the Commission later determines that the balance of public convenience and necessity shifts through competition or otherwise, so that injury to the public from impairment of the inherent advantages [of motor transportation] . . . exceeds the advantage to the public . . . the Commission may correct the tendancy." (326 US 60, 71-72).

How much more appropriate this language under the Civil Aeronautics Act of 1938 which *expressly* authorizes the Board to suspend, alter, amend or modify certificates when the public convenience and necessity so require, and under which the preservation of the inherent advantages of air transportation, which is directly in issue here, is made a significant part of the public interest test. This is not a situation where "the law has spoke too softly to be heard" above the clamor of vested rights; its letter is clear, its intent manifest and its command compelling!

Insofar as counsel has been able to determine, there is no authority whatsoever for the contention of the petitioner that the Board is powerless to order this temporary suspension. The Civil Aeronautics Act of 1938 represents the most recent federal regulatory Act of its kind and is properly interpreted to embody many improvements over earlier statutes, under whose provisions regulatory shortcomings had become obvious by 1938. The experience of other regulatory bodies under statutes authorizing less flexible action was certainly in the mind of the framers as is shown later herein in the legislative history. In addition to experience under the three Parts of the Interstate Commerce Act already discussed, other federal statutes

show that Section 401 (h) of the Civil Aeronautics Act was a grant of a new regulatory feature since it granted to the Board not only the usual penal provisions in suspension and revocation, but gave the Board an economic sanction to apply according to the dictates of the public convenience and necessity. (Compare, Section 4 (c) of the Federal Alcohol Administration Act, 49 Stat. 978 (1935), 27 U. S. C. A. 204 (c) (Supp. 1946) which permits suspension or revocation only for violation; Section 6 of the Federal Power Act, 41 Stat. 1067 (1935) 16 U. S. C. A. 799 (1946) provides for suspension upon the "mutual agreement" of the government and the holder, and for revocation for violations; the Merchant Marine Act, 49 Stat. 1985 (1936), 46 U. S. C. A. 1101 (1946) contains no provision analogous to Section 401 (h). Most state laws provide for suspension for "good cause" and for revocation for intentional violation. See, *e.g.*, Ariz. Code Ann. tit. 66, 511 (1939); Tenn. Code Ann. 5501.1 (Williams 1934). Utah Code Ann. c. 76, art. 5, ss 33 (1943); Ohio Code Ann. 614-87 (Page 1946)).

Recourse to the legislative history is not actually required in this proceeding, since the language of the statute is free from ambiguity and its purpose and intent defined in terms that do not conflict. But even if the Court should have some question with regard to the intent of the framers of the Act in enacting Section 401 (h), reference to the legislative history shows conclusively that the action here taken by the Board was fully appreciated and intentionally authorized.

Air transportation in the United States, from its inception as a mode of transportation has been, as it were, at the breast of the United States government. Prior to 1926, little had been accomplished in aviation beyond the adventure of experimental service. In 1915, President Wilson established the National Advisory Committee for Aeronautics (38 Stat. 930 (1915), as amended 45 Stat. 1451 (1929), 52 Stat. 1027 (1938), 50 U. S. C. Supp. 151 (1938));

that Committee was charged with the duty of supervising, directing and conducting fundamental scientific research and experiment in aeronautics. In the Post Office Appropriation Bill for 1917, $50,000 was set aside for air mail service (53 Cong. Rec. 9624 (June 20, 1916)) but when eight routes were advertised for competitive bids, only one bid was received, and that rejected because the bidder could not give bond. (53 Cong. Rec. 2035 (Sept. 2, 1916)). In effect, commercial service did not really get under way until 1918, with the inauguration of the Washington to New York route by *army* flyers carrying the mail (83 Cong. Rec. 6629 (May 11, 1938)).

By 1925, it was believed that the air carrier industry had developed sufficiently to shift the service from the Post Office to private contractors, and in that year the Air Mail Act of 1925 (43 Stat. 805 (1925), 39 U. S. C. 461 (1928)) was passed. That Act gave the Postmaster the bare right to let contracts for carrying mail to private contractors, and authorized him to make rules and regulations necessary for such transportation. In 1928, the Air Mail Act of 1925 was amended to substitute *route certificates* of not over ten years duration in the nature of franchises for air mail services. (45 Stat. 594 (1928), 39 U. S. C. 465 (a) (1934)). Under a similar amendment known as the *Watres* Act, the Postmaster General was given broad economic authority over the carriers by regulating (1) route location, (2) route consolidations and extensions, (3) contract bidding conditions, (4) service standards, (5) equipment and personnel, (6) accounts, and (7) compensation, including losses from passenger traffic. (46 Stat. 259 (1930) 39 U. S. C. 464 (1934); See also, *Airmail: The Watres Act in Its Workings,* Aviation Magazine, March 1932).

This brief outline of events up to 1930 indicates the nature of the broad regulatory power vested in the Postmaster General, not only with respect to mail services, but with respect to the economic regulation of carriers under route certificates. By 1933, Congress believed that the

situation was out of hand, that too much money was being paid to support the air service, and an investigation was undertaken headed by Sen. Black from Alabama (now Associate Justice Black of the United States Supreme Court). (See, *Hearings on Investigation of Air Mail and Ocean Mail Contracts,* 73rd Cong., 2d Sess., pursuant to S. Res. 143 and S. Res. 349 (1934) *and House Report* No. 1956, 72nd Cong. 2d Sess. (1933); see also, Address by Senator Black delivered on nation-wide hook-up, reprinted 78th Cong. Rec. 2715 (Feb. 19, 1934)). Before that Committee had gone very far, the Postmaster issued a summary order *cancelling all domestic route certificates* as of February 19, 1934 (See, Fagg, *National Transportation Policy and Aviation,* 9 J. of Air L. 155 (1936); Fagg's article is an excellent review of Federal legislation past and prospective). Injunction proceedings by the carriers against this summary cancellation of their route certificates were wholly unsuccessful, and the summary action of the Postmaster upheld. (*Transcontinental and Western Air Inc.* v. *Farley,* 71 F. (2d) 287 (2d Cir., 1934). Under Executive Order by President Roosevelt, the army took over all operations (Fagg, *supra,* p. 169) and Congress passed a statute authorizing the necessary transfers of personnel, property and appropriations (Public L. 140, 73rd Cong. 2d Sess., Mar. 27, 1934).

The result of the Committee's investigation was the enactment of the Air Mail Act of 1934 (48 Stat. 933 (1934), 39 U. S. C. 463 (1934); see, *Some Implications of the Air Mail Act of 1934,* 47 Yale J. 465-9 (1934). At the same time, Senator McCarran, a member of the Black Committee, introduced the first of a long series of bills providing for an independent agency to regulate the economic and safety aspects of air transportation (see, S. 3187, 73rd Cong., 2d Sess. (1934)) but the bill was defeated.

The Air Mail Act of 1934 made the air carrier industry subject to federal regulation from three sources: the Post Office awarded contracts and determined schedules; the

I. C. C. fixed rates; and the Bureau of Air Commerce licensed aircraft and personnel and operated the airways and provided safety regulations. The Act also contained a provision for the appointment of a Federal Aviation Commission to make a study of the whole aviation problem and report back to Congress (See, *Report of the Federal Aviation Commission,* Sen. Doc. 15, 74th Cong., 1st sess. (1935)).

In 1935, Congress passed an amendment prohibiting "off-line" service if such service would in any way compete with the service available on an air mail route. (49 Stat. 619 (1935), 39 U. S. C. Supp. 469 (N) (1935). This amendment made expansion almost entirely dependent on air mail contracts and the industry was, for all practical purposes, frozen temporarily (see, *The Economic Regulation of Air Transport,* 5 U. Chi. L. Rev. 471.7 (1938)).

Between 1934 and 1938, the aviation industry was under the control of the Post Office, and its development wholly dependent upon grants from that branch. The plenary power in the Postmaster to issue a "death sentence" against a carrier, almost at will was never successfully challenged (see, *e.g., Boeing Air Transport* v. *Farley,* 75 F. 2d 765 (D. C. Cir. (1935) *cert. den.,* 294 U. S. 728 (1936); *Pacific Air Transport* v. *Farley,* decided with the Boeing case, *supra*; *Pennsylvania Airlines* v. *Farley,* 75 F. 2d 769 (D. C. Cir. 1935; Note, *Air Mail Cancellation of Contracts by the Postmaster General,* 6 Air L. Rev. 59 (1936)).

But during the period from 1934 to 1938, the entire matter was still being pursued by Congress in an attempt to achieve some sort of stability and to find procedures whereby a proper balance between government regulation and carrier freedom could be achieved. (A list of Bills considered by Congress during that period is contained in Appendix A of Rhyne, Civil Aeronautics Act Annotated (1939 189). In January 1935, the Federal Aviation Commission submitted its report with 102 recommendations based on its study (Sen. Doc. No. 15, 74th Cong. 1st Sess.

(1935)). That Commission recommended that "All regular domestic scheduled transport operations should require a certificate of convenience and necessity, to be issued by the Commission. . . . Such a certificate should not be cancelled except for good cause without equitable compensation to the holder." On the same day, Congressman Lea introduced a bill which embodied most of the recommendations of the Commission (H. B. 5174, 74th Cong., 1st Sess. (1935); see, Wigmore & Fagg, *An Explanation of the Lea Bill,* 6 J. Air L. 184 (1935)). But President Roosevelt objected to the creation of an independent authority with broad powers to regulate air commerce (see, Message of President Roosevelt which accompanied the *Report of the Federal Aviation Commission, supra.*) despite the favorable recommendations along those lines from the Commission. (The *Commission's report* had said: "The Commission so created should have broad supervisory and regulatory powers over civil aeronautics, and particularly over domestic and foreign transport." *Report, supra,* Sen. Doc. No. 15 at 243). Senator McCarran introduced a bill to carry out the *President's* recommendations (S. 3027, 74th Cong., 1st Sess. (1935), which was expressly patterned upon *existing* federal regulation of transportation. (See Rhyne, *supra,* at 44). That bill would have put the regulation of aviation under the I.C.C. with regulatory powers practically *identical* with those possessed by the Commission over motor carriers and water carriers (see Part II and III of the Interstate Commerce Act, 49 Stat. 548, as amended, 54 Stat. 919, 49 U. S. C. 312 (1946); 54 Stat. 929, 49 U. S. C. 901 (1946)). After hearings (See, *Hearings on S. 3027,* Before a Subcommittee of the Committee on Interstate Commerce, 74th Cong. 1st Sess. (1935)) the bill was rewritten and re-introduced as S. 3420, (74th Cong. 1st Sess. (1935)). The Committee Print of S. 3420, dated Aug. 29, 1935 has a caption which states:

> "This print . . . shows derivation and comparability of the various sections of this bill with the provisions

of Motor Carrier Act, 1935, Interstate Commerce Act, . . . and bill for the regulation of waterways. . . . "

(See also, comparative print of S. 3027, 74th Cong. 1st Sess. 1935).

For our purpose here, the provisions of section 405 (m) of S. 3027 show the prevailing philosophy of the day induced by President Roosevelt's reaction to an independent commission with broad regulatory powers. That section, which is very similar to the component provision in the present Motor Carrier Act, provided:

> "Any certificate may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or upon the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply [with the law]"

A like provision, for all practical purposes is contained in H. R. 5234 (75th Cong. 1st Sess. (1937) section 305 (j). This provision was also patterned on the Motor Carrier Act (see, testimony of Commissioner Eastman, *Hearings on H. R. 5234,* Before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong. 1st Sess. (1937) at p. 41). By the end of 1937, the House and Senate had agreed for all practical purposes on legislation to regulate the economic phases of air transportation (See S. 2, 75th Cong. 1st Sess. (1937) and H. R. 5234, *supra.*). House Report No. 911 (75th Cong. 1st Sess. 1938)) said of the two versions:

> "The fundamental purpose of this proposed legislation is to extend to the Interstate Commerce Commission regulatory powers over air transportation, *generally similar* so far as applicable, *to the powers* it now exercises over rail and motor transportation." (Italics added).

Had Congress proceeded to adopt the legislation as proposed, and particularly as reflected in Sections 405 (m) of

H. R. 5234 and 305 (j) of S. 3027, the petitioner in this proceeding would be correct in asserting that the Board is without authority to suspend or alter a certificate except on application from the holder, and could not otherwise suspend or revoke except for knowing and willful violation of the law. But the plain fact is Congress did *not* adopt any of the legislation so proposed. President Roosevelt then appointed an Interdepartmental Committee to review the whole picture and to make necessary recommendations with respect to *who* should regulate aviation, and *what powers they should be given in order to establish and maintain a sound* air transportation system. (See *Hearings on H. R. 9738,* Before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong. 3rd Sess (1938)). That Interdepartmental Committee was composed of representatives of six executive agencies, and took voluminous testimony of all interested parties both in government and industry. But the I. C. C. was not appointed to the Committee, and "was intended to have its feathers plucked" (See remarks of Rep. Withrow, 83 Cong. Rec. 6505 (May 9, 1938). While Congress was not in session during the late summer and early fall of 1937, this Committee undertook its long and extensive hearings for the revision of the bills. President Roosevelt at about the same time revised his views and announced that he *favored* an *independent authority, with broad powers to regulate the industry* (83 Cong. Rec. 6628 (May 11, 1938).

All this study, revision, reorganization and the like resulted in H. R. 9738 (75th Cong. 3rd Sess. (1938)), in which Congressman Lea embodied the recommendations of the Interdepartmental Committee. (See, *Hearings on H. R. 9738, supra.*) Mr. Hester, Ass't. General Counsel of the Treasury and Fred D. Fagg, Director of Air Commerce appeared and testified with respect to the work of the Interdepartmental Committee. No official record of the Interdepartmental Committee's work is available, but

this bill, Mr. Hester said, "embodied the unanimous recommendations of the six executive departments. . . . " (Id. at p. 2)

Thus after a complete restudy of the legislation previously proposed, and in the light of the new philosophy that had taken hold that aviation should be under *a newly created and independent authority with broad regulatory powers,* H. R. 9738 was drafted to reflect the new philosophy (*Hearings on H. R. 9738, supra.*). A comparison of *Section 402 (k)* of this new legislation with *Section 405 (m)* of the earlier versions in S. 3027 shows conclusively the intention to arm the new authority with *power to supervise on a continuing basis,* where the I. C. C. was empowered with no such authority. Section 402 (k) of the 1938 revisions reads as follows:

> "The Authority upon petition or complaint or *upon its own initiative* after notice and hearing, *may alter, amend, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require,* or may revoke any such certificate, in whole or in part, for intentional failure to comply with [the law]"

Thus, where the I.C.C. under the earlier versions would have had power to alter or amend *only upon application of the holder, the new Authority was empowered to act "on its own initiative" when the public convenience and necessity required such a change.* The power to revoke only for knowing and willful violation of the law remained the same. This marked change in the language makes it obvious that the provisions permitting action by the Board to protect the public convenience and necessity irrespective of carrier will or carrier violations were intentionally drafted as they now read. The same is apparent from House Report No. 2254 (75th Cong. 3rd Sess. (1938)). That report says that the purpose of the legislation was to create an independent agency and "to authorize the new agency to perform *certain new regulatory functions* which are designed to stabilize the . . . industry." (*Id.*, p. 1).

Other revisions of the bill were proposed in both Houses of Congress (See, Rhyne, *supra,* at p. 54 et seq.) but the provisions of Section 402 (k) of H. B. 9738 remained substantially unchanged except to add the power to *modify* (again showing the deliberate care given this particular provision), and the bill so read as finally adopted by Congress. (Public L. 706, 75th Cong. Ch. 601, 3rd Sess., 52 Stat. 973 (1938) 49 U. S. C. 401 *et seq.* (1946)).

With respect to the broader power given the new authority Rhyne has said:

> "While the economic provisions of the Act are admittedly modelled upon the ideas already enacted into law in various provisions of the Interstate Commerce Act, the wording and draftsmanship of the Civil Aeronautics Act of 1938 represents a vast improvement upon that of the provisions of the Interstate Commerce Act. If the suggested revision in the Interstate Commerce Commission . . ., based upon the experience under the Civil Aeronautics Act, comes to pass, it might be well to revise the wording of certain of the regulatory provisions of the Interstate Commerce Act." (*Id.* at 95)

(See also, Hester, *The Civil Aeronautics Act of 1938,* 9 J. Air L. 451 (1938)). And even under the earlier proposals for economic regulation over air carriers, Commissioner Eastman of the I. C. C. had said:

> "The declaration of policy also makes it clear that we must be guided in our regulation by the peculiar conditions of air transportation, rather than by conditions in other forms of transportation."

(See, *Hearings on S. 3027, supra,* at p. 37). Mr. Edgar S. Gorrell, President of the Air Transport Association whose membership consisted of almost every airline in the country, testified before the same Committee that,

> "We realize that our industry is, peculiarly, one affected with the public interest. No other is so inti-

mately bound up with the demands of our national Government both in peace and in war time." (*Id.* at 53)

Further evidence of the change wrought in the Interdepartmental Committee with regard to the regulatory powers to be given the new commission is seen in the revision of the earlier proposals with respect to grandfather rights. The previous proposals would have made the granting of a certificate to any carrier operating prior to the adoption of the Act mandatory upon the I. C. C. (See, *e.g.*, S. 3027, *supra.*). But as proposed and as finally adopted after the Interdepartmental Committee study, grandfather certificates were not mandatory, and the Act expressly gives the Board the power to *deny or alter* prior existing routes if "the service rendered by such applicant . . . was inadequate and inefficient" (Section 401 (e) of the Civil Aeronautics Act; see, *Hearings on H. R. 9738, supra,* at p. 39). Thus, even with rerpect to *prior existing rights,* the Board was empowered to correct inadequacy or inefficiency. Section 401 (h) carries over that power, among others, into future proceedings in order that the Board might supervise, on a continuing basis, the operations under a certificate so as to insure that the public convenience and necessity, as defined in Section 2 of the Act, is protected.

Further evidence of the authority to supervise on a continuing basis even the rights held before the Board was established is seen in Section 1108 of the Act as adopted. Under that section, "All orders . . ., permits, contracts, *certificates, licenses,* and privileges . . . issued [before the Act] shall continue in effect until *modified, terminated, superseded, set aside* or repealed by the Board . . . "

Needless to say, certificates of public convenience and necessity granted under Title IV of the Act were intended to give stability to the carriers, but that aim is subordinate to the intent to protect the paramount public interest in the development of an air transportation system properly adapted to the declaration of policy in Section 2 of the Act.

(See, *Hearings on H. R. 5234, supra,* at p. 66 *et seq.*) It was certainly never understood, by the industry, which had been used to summary action by the Postmaster General, that route certificates were to be regarded as wholly inviolate. As a matter of fact when some question arose as to the permanence of certificates, Mr. C. R. Smith, President of American Airlines, testified that certificates of *unlimited duration* were preferable from the *attractiveness* to investor standpoint, but should be, he thought, subject to *suspension for cause.* "There would be no occasion," he said, "to issue a certificate for a limited time *as long as the Commission is given authority to cancel it.*" (*Hearings on S. 3027, supra,* at p. 50.). And Mr. Gorrell, testifying on H. R. 5234 (*supra,* at p. 68) said:

> "We should proceed a step at a time, giving *both public administration and private management* an opportunity to learn new lessons and *to un-learn old ones* that may prove false." (Italics added.)

The Civil Aeronautics Act of 1938, as finally adopted, had inherent in it these philosophies. The Board may grant a certificate for an unlimited period under 401 (d) (1) or for a temporary period under 401 (d) (2), but whether the certificate is granted for an unlimited period or for a temporary period, Section 401 (g) provides that unlimited certificates shall remain in effect until "suspended or revoked as hereinafter provided," *and* in the case of temporary certificates issued under 401 (d) (2) those certificates too shall remain in force and effect until the date specified therein, "unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein . . . " Thus 401 (g) negates any belief that certificates issued for an unlimited period may not be suspended; it expressly distinguishes between unlimited certificates and temporary certificates, and makes *both* subject to suspension.

The Act, its legislative history, and its obvious intent and purpose show conclusively that the Board has a continuing

power of supervision and may act to alter a certificate whenever the public convenience and necessity so requires. In this respect it was no accident that the Act is broader than the power given the I. C. C. under the Interstate Commerce Act. The Board was armed with authority to "un-learn" its errors and to act in accordance with the requirements of the public convenience and necessity as those requirements through experience manifest themselves from time to time. To deny the Board that power is to turn back the clock to a restrictive philosophy which was expressly and intentionally replaced by Congress, and to "un-learn" all the experience Congress had under the provisions of the Interstate Commerce Act. For example, the Ass't. Secretary of Commerce, commenting on Section 305 (j) of H. R. 5234 said that to permit certificates to be inviolate except for "willful violation" would "clearly serve to place an undue burden on the Government."; (See, *Hearings on H. R. 5234, supra*) and his fear did not go unheeded; the revisions as reflected in the present Act remove that element when the public convenience and necessity require the action, but admits it when the carrier is charged with violations. The "good cause" for suspension is the public convenience and necessity.

There can be no doubt therefore, that Congress established a dual standard for control over certificates. It gave the Board an *economic sanction* to be employed when the public convenience and necessity required a change and it gave the Board a penal sanction in revocation when the carrier intentionally violated the laws. It permitted the Board to act constructively in the future to achieve through administrative flexibility the high purposes of the Act. (See, Landis, The Administrative Process, 69, 78 (1938)). To read the Act otherwise does violence to its purposes and intent, and makes a nullity of its express provisions.

4. The affirmance by this Court of the Board's order of suspension will not be conducive to instability in the air transportation industry.

It is probably true that there may be a few timorous souls whose faith in the stability of air transportation would be seriously shaken by the knowledge that the Board has power to suspend Western at Yuma and El Centro if the public convenience and necessity so require. Their lack of faith assumes, of course, that the Board acts arbitrarily, and without cause or justification. If such an assumption were to be so accredited as to justify a denial of this power to the Board, then it would provide equally sound basis for stripping the Board of *all power* having any bearing on the industry's welfare or the public interest. For the Board has numerous powers which if seriously abused could have disastrous effects on the industry and public. But the existence of a power is not to be denied merely because it is susceptible to abuse. *All* power is susceptible to abuse!

Actually, if any assumption at all is to be made, it must be an assumption that the Board is a responsible agency.

Western argues that if the Board can suspend it at Yuma and El Centro it can also suspend it at Los Angeles, for example. And so it can, if the public convenience and necessity so require. Needless to say, however, Western would have no difficulty in showing that the public convenience and necessity require its retention in Los Angeles. So neither Western nor its present and prospective investors have any basis for concern on this score. Western attempts to support its argument by hypothesizing a case of flagrant abuse of power. The answer of course is that any lawful power can be abused. It is nonetheless a lawful power when properly exercised. The courts, of course, are the bulwark against such abuse of power.

In any event, however, the clear language of the statute, granting to the Board the power of suspension, and in other provisions the power of life and death over a carrier,

has been facing the industry and the investing public since 1938 when the Act was passed. Prior to that time, as the industry knows, and has heretofore been shown, survival in the aviation industry was indeed subject to whim and caprice and the ravages of almost wholly uncontrolled economic forces. Protection against such destructive elements as these represents the cardinal contribution of Congress toward the stability of the air transportation industry.

It should be borne in mind, too, that if in a given case it had been established that a *given action* would seriously prejudice the stability of the industry, then that fact alone would weigh very heavily in the determination as to whether or not, in that particular case, the public convenience and necessity required suspension. A proposed suspension of Western at Los Angeles would no doubt present such a question. The suspension at Yuma and El Centro certainly does not!

5. Petitioner has not been deprived of its property without just compensation in violation of the Fifth Amendment of the Constitution.

In the first place the statute (Section 401) which authorizes the granting of a certificate (401 (d) (1)), contains the express reservation that "no certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility" (Section 401 (i)). A certificate is accepted subject to this condition.

It is elementary that a license, which is a privilege, can be withdrawn without holding the licensee harmless from any financial injury that he may suffer.

In many instances licenses can be withdrawn without cause, and without compensation for losses incurred as a result.

A license withdrawn for *good cause* rarely ever entitles the licensee to compensation therefor. Where, as here, there is good cause (the public convenience and necessity) and

the license has been granted and received subject to an express condition that it confers no property or proprietary rights, a claim that the licensee is entitled to just compensation is wholly unsound.

The *Report of the Federal Aviation Commission* (Sen. Doc. No. 15, 74th Cong., 1st Session (1935)) recommended that certificates granted "should not be cancelled *except* for good cause without equitable compensation to the holder." (Italics added). But Congress went even farther in the Civil Aeronautics Act by insuring against *any* cancellation, without good cause, thus rendering the question of compensation wholly immaterial.

In considering the equitable side of the matter it should not be overlooked that for fourteen years Petitioner has not only had its losses underwritten by the Government but has also been paid by the Government a return of better than seven percent on its recognized investment (*after taxes*). Moreover, a part of petitioner's expenses which were recovered back from the Government include petitioner's depreciation charges against its ground and flight equipment since 1938; petitioner has in effect, therefore, recovered back its investment, at the expense of the Government.

For a carrier, whose profits and very existence for over fourteen years have been provided for by the Government, to now talk about just compensation seems unconscionable in the extreme.

Also it might be noted that Bonanza stands ready and willing to purchase petitioner's ground facilities at Yuma and El Centro, so that receipt of just compensation for its investment at those stations actually lies entirely within the discretion of petitioner.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Board's Order here under review should be affirmed forthwith.

Washington, D. C., March 29, 1952.

Respectfully submitted,

G. Robert Henry,
Attorney for Bonanza Air Lines, Inc.

Certificate of Service

I certify that on this date, as attorney for Bonanza Air Lines, Inc., intervener herein, I will have caused the foregoing brief of Bonanza to be served upon the attorneys for The Civil Aeronautics Board, Western Airlines, Inc., and Southwest Airways Company, by mailing three copies to each, properly addressed with postage prepaid.

G. Robert Henry,
Attorney for Bonanza Air Lines, Inc.

Washington, D. C.,
March 29, 1952.

APPENDIX "A."

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Served: Jan. 17, 1952.

DOCKET No. 2018 *et al.*

REOPENED ADDITIONAL CALIFORNIA-NEVADA SERVICE CASE.

Decided: January 17, 1952.

Certificate of public convenience and necessity on Bonanza Air Lines, Inc., for route No. 105 amended to authorize service, with certain limitations, between the coterminal points Los Angeles and Long Beach, Calif., and Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif.

Certificate of public convenience and necessity of Western Air Lines, Inc., for route No. 13 temporarily suspended, insofar as it authorizes service to El Centro, Calif., and Yuma, Ariz.

Certificate of public convenience and necessity of Frontier Airlines, Inc., for route No. 93 temporarily suspended, insofar as it authorizes service on segment 1 between Yuma and Phoeniz via Ajo, Ariz.

Western's authority to serve San Bernardino and Palm Springs, Calif., not suspended.

Except, as otherwise above indicated, applications for additional local air service in California and Arizona denied.

APPEARANCES:

E. W. Jennes, Paul D. Lagomareini, and *Howard C. Westwood* for American Airlines, Inc.

Alexander C. Dick, G. Robert Henry, and *Frank W. Beer* for Bonzana Airlines, Inc.

Harry A. Bowen and *Emil N. Levin* for Frontier Airlines, Inc.

Martin J. Burke and *W. Clifton Stone* for Los Angeles Airways, Inc.

Walter Roche, C. Edward Leasure and *H. F. Scheurer, Jr.,* for Southwest Airways Company.

James K. Crimins and *Henry P. Bevins* for TransWorld Airlines, Inc.

Floyd M. Rett, John T. Lorch and *James Francis Reilly* for United Air Lines, Inc.

D. P. Renda and *Donald K. Hall* for Western Air Lines, Inc.

James D. Murphy for the State of Arizona Corporation Commission and Greater Arizona, Inc.

Robert N. Berlin and *Chester K. Hendricks* for the city of Banning, Calif.

Edward A. Mass for the Beaumont Chamber of Commerce.

Wayne H. Fisher and *W. M. Balsz* for the city of Blythe.

Seraphim B. Perreault for the Brawley Chamber of Commerce.

Perry Perreaut for the city of Brawley, Calif.

W. G. Duflock for the city of El Centro and the El Centro Chamber of Commerce.

Alexander W. Staples for the city of Indio.

Russell W. Ring for the city of Palm Springs.

Roy D. Boles for the city of Ontario.

Eugene Best for the city of Riverside.

T. T. Hannah for the county of Riverside.

A. W. Walker for the county of San Bernardino.

Harold G. Lord for the city of San Bernardino.

George Kerrigan for the city of San Diego.

John B. Wisely, Jr., and *Harold C. Giss* for the city and county of Yuma.

Julian T. Cromelin and *Frank J. Delany* for the Post Office Department.

Ronald H. Cohen and *Ernest Nash,* Public Counsel.

Dean E. Howell for the County of San Diego.

John T. Kimball for the Phoenix Chamber of Commerce.

Nicholas Udall for the city of Phoenix.

John B. Lydick for the County of Imperial.

John H. L. Bate for the Harbor Commission—Port of San Diego.

Opinion.

By The Board:

In this proceeding, we are once again presented with the question of the local air service needs of the Los Angeles-San Diego-Phoenix area.[1]

A public hearing was held before Examiner F. Merritt Ruhlen, and his report was served on the parties on August 17, 1951. The Report recommended, *inter alia,* that local air service be provided between San Diego and Phoenix via El Centro, Yuma, and Ajo, and that Western Air Lines, Inc. (Western), rather than either of the local service applicants, Southwest Airways Co. (Southwest), or Bonanza Air Lines, Inc. (Bonanza), be selected to render the service. The Examiner found that local service between Los Angeles and San Diego via Santa Ana-Laguna Beach and Oceanside, and between Los Angeles and Phoenix via San Bernardino, Palm Springs, or to any of the other cities for which application for such service was made is *not* required. The Examiner also recommended the suspension of Frontier Airlines, Inc.'s (Frontier), authority to serve Yuma-Ajo-Phoenix, and Western's authority to operate flights between San Bernardino or Palm Springs on the one hand, and El Centro-Yuma on the other.

Exceptions to the Examiner's Report were filed by Southwest, Bonanza, Frontier, United Air Lines, Inc. (United), and Western, and except for United which called attention to its brief before the Examiner, each of the foregoing parties filed briefs in support of their exceptions. The aforementioned parties and certain civic intervenors also appeared in oral argument before the Board.

Attached hereto as an Appendix are portions of the Examiner's Report containing the findings, evonclusions, and recommendations with which we agree, and adopt as our own. We shall discuss herein principally those matters on which we have reached a conclusion different from that recommended in the Report, and those contentions of the parties wich warrant furter expression of our views.

[1] See Appendix. pp. 1-3, for a statement of our previous consideration of this matter.

Los Angeles, Santa Ana-Laguna Beach, Oceanside, San Diego Service.

In a supplemental decision in the original *California-Nevada Service Case,* we found a need for local air service to Santa Ana-Laguna Beach, Oceanside, and San Diego as part of a Los Angeles-Phoenix route as well as a need for locl air service to El Centro, Yuma, and Ajo.[2] We have carefully considered the record in this, the reopened proceeding, and find no basis therein for changing our original conclusion as to the need for a local Los Angeles-San Diego service as part of a Los Angeles-Phoenix local service route.

As we previously noted, because the area around Los Angeles is heavily built up and traffic congestion is increasing, travel by automobile from Santa Ana or Laguna Beach to the Los Angeles and Long Beach municipal airports is comparatively slow. Air service to these two communities would make convenient transportation available to the north and east through trunkline connections at either Los Angeles or San Diego. As for Oceanside, it is not within convenient driving distance of either Santa Ana or San Diego, and its economic strength, plus its location near the Pendleton marine base, indicate that it would benefit from local air service.

Moreover, if the local service route between Phoenix and San Diego is not extended to Los Angeles, a considerable amount of the local traffic will be inconvenienced. There is no question that for the cities east of San Diego, such as El Centro, Yuma, Ajo, and Blythe,[3] Los Angeles is the western point of greatest traffic attraction. Terminating the San Diego-Phoenix local service route short of Lon Angeles would inhibit the full development of the local service traffic potential since the relative time and service advantage of air transportation over surface transportation for the relatively short distances here involved would be watered down by the necessity of using a connecting service.

If, as we have found, Los Angeles is the appropriate terminal for the local service route east of San Diego to be certificated herein, the additional certification of local service stops between San Diego and Los Angeles appears to be in the public interest since the added cost of this local service experiment between these points would consist pri-

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[2] *Additional California-Nevada Service Case, Los Angeles-San Diego-Phoenix,* 11 C.A.B. 39, 40-45.

[3] See pages 4-6, *infra.*

marily of the added station expenses.[4] Moreover, the addition of two intermediate points between San Diego and Los Angeles is desirable to discourage the carrier from competing for terminal-to-terminal traffic between Los Angeles and San Diego. We concur in the Examiner's conclusion that additional Los Angeles-San Diego terminal-to-terminal service does not appear required by the public convenience and necessity. We recognize that some terminal-to-terminal traffic will fly on the local service carrier's aircraft. However, we feel that the amount of diversion from the nonstop trunk services currently certificated between these points that will result from a local air service in smaller, slower aircraft should not be substantial.

We have considered also the effect of our decision on Los Angeles Airways' authority to operate a local service route with rotary-wing aircraft in the Los Angeles area which would, of course, be duplicated in part by the Santa Ana-Laguna Beach-Los Angeles segment here found to be required by the public convenience and necessity. However, the date on which Los Angeles Airways will inaugurate passenger service between these points is still in the indefinite future, and the extent of public acceptance of transportation by rotary-wing aircraft is still unknown. In any case, we believe that the amount of diversion of Los Angeles' traffic would be negligible.

With respect to Oceanside, the principal contention adverse to its certification is that the only suitable airport, that at the Pendleton marine base, is not available for civilian use. While the record is inconclusive as to the availability of this airport, we note that other military airports in the same section of the country are being used by civil air carriers, and it is reasonable to expect that similar arrangements could be made in this case, especially where the inauguration of such service would be a substantial convenience to the military personnel stationed there.

Local air Service to Blythe, Calif.

The Examiner's Report recommended against the inauguration of a local service experiment to the city of Blythe, Calif., although recognizing that the community is a rela-

[4] Some additional flight costs are also involved since it is relatively more expensive to land or take off an aircraft at a point than to overfly it, but these costs are not substantial.

tively isolated one. However, the Report did not consider the possible inclusion of the point on the San Diego-Phoenix local service segment but only on a Los Angeles-Phoenix route via Palm Springs and San Bernardino, a segment which was not found to be required by the public convenience and necessity, a conclusion with which we do not quarrel.

On the other hand, we have considered the possible inclusion of Blythe on the local service route between San Diego and Phoenix, and have determined that the inauguration of air service to Blythe on that route is required by the public convenience and necessity.

Blythe is located 238 miles southeast of Los Angeles, 156 miles northwest of Phoenix, and about 65 miles northwest of Yuma. Its 1950 population was 4,086 representing a 73.5% increase over its 1940 population. In the immediate surrounding territory there are an additional 6,000 people, making a total of about 10,000 persons living in this community. It is primarily an agricultural community in an area of considerable agricultural wealth. In addition, it has some manufacturing including one of the largest gypsum plants in the United States.

Blythe's primary communities of interest are with Los Angeles and Phoenix. In a representative 30-day period in 1950, it is estimated that over 7,000 persons from Los Angeles were registered in Blythe hotels, and over 1,000 from Phoenix. A secondary community of interest is similarly indicated with San Diego and Yuma.

There is no passenger rail service available at Blythe. Bus transportation, which is available, takes 4 hours to Phoenix and about 6 to 7 hours to Los Angeles. Among other testimony as to relative inconvenience of current mail service, there is evidence in the record that mail deposited in the morning at Blythe frequently is not delivered in Los Angeles until 48 hours later.

Blythe could be served by air between Yuma and Phoenix as an alternate intermediate point to Ajo, in which case the additional costs of inaugurating a local air service experiment to the point would consist principally of the added station costs, and flight costs for an additional 35 miles between Yuma and Phoenix for the added circuity of such route over a flight between such points via Ajo.

Based upon the foregoing considerations and all the facts of record, we find that the public convenience and

necessity require the provision of a local air service between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif., with Blythe and Ajo being served on alternate flights.

Selection of Carrier.

As previously noted, the Board in its original decision herein awarded the above route (with the exception of Blythe) to Southwest [5] (11 C.A.B. 39). However, prior to the date upon which the award would have become effective, the Board, after consideration of petitions for rehearing, reargument, and reconsideration filed by several parties to the proceeding, alleging, *inter alia,* that the Board's award to Southwest was, in part, outside the issues in the proceeding and could not be supported by the record therein, vacated such award.[6] The order set Southwest's application down for further hearing, permitted such application to be amended to place squarely in issue a Los Angeles-Phoenix local air service via San Diego, and consolidated into the reopened proceeding those parts of its previous decision as related to suspending portions of Western's and Arizona's (Frontier's predecessor) routes conflicting with a possible Los Angeles-San Diego-Phoenix local service route.

Southwest argues that this order was legally deficient insofar as it purported to rescind the route awarded to Southwest. It is the carrier's position that, under the provisions of section 401(g) of the Act,[7] a certificate once issued to a carrier may not be rescinded even *prior* to the date upon which it is to become effective except upon compliance with the requirements of section 401(h) of the Act; to-wit, after notice and hearing, and upon a showing of wilful fail-

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[5] The choice of carrier was between Western, a trunk carrier, and Southwest, a local service carrier, since Bonanza was not then a party to the proceeding.

[6] In Docket No. 2899, which was consolidated into this proceeding, Southwest had applied for a route extension from Los Angeles to San Diego, and from Los Angeles to Phoenix via various intermediate points. Southwest, however, had not specifically applied for a Los Angeles-Phoenix route via San Diego.

[7] As noted by the carrier, section 401(g) provides in part that "each certificate shall be effective from the date specified therein and shall continue in effect until suspended or revoked as hereinafter provided."

ure to comply with a requirement of the Act, an applicable regulation, or a certificate condition, which after having been called to the carrier's attention was not corrected. We must reject this contention. Southwest was clearly on notice that the original award was subject to reconsideration and we are satisfied that the Board's action in reopening the proceeding was proper.[8] Our attention has not been directed to any contrary authority. We, therefore, do not feel inhibited in selecting a carrier by our previous decision to award a substantially similar route to Southwest.

Before proceeding further with our opinion as to the carrier to be designated, there is one additional point to be made. The Examiner noted, and we agree, that the selection of a carrier to render the local air service between San Diego and Phoenix necessarily involves the question of suspension of Western's authority at El Centro and Yuma, and Frontier's authority over its Yuma-Ajo-Phoenix segment since there is insufficient traffic potential at any of these points to justify service by more than a single carrier. Western seeks to inhibit our ability to select a carrier other than itself by challenging our authority to compel a certificated carrier to suspend service to a point for reasons other than misuser or default. We have on other occasions met similar challenges to our authority with a full expression of our views as to our power to so act.[9] We are not here presented with any new arguments which warrant further discussion.

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[8] The certificate "issued" to Southwest which was attached to the Board's order (Serial No. E-3727, dated December 19, 1949) stated on its face: "This certificate, as amended, shall be effective on February 17, 1950: Provided, however, That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of December 19, 1949 (Serial No. E-3727), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time." (See 11 C.A.B. 39, 50-51). The effective date of this certificate was extended to March 31, 1950 by Orders Serial Nos. E-3869 and E-3935, dated Feb. 2, 1950 and Feb. 24, 1950, respectively. Since the opinion in the *Kansas City-Memphis-Florida Case, Supplemental Opinion*, 9 C.A.B. 401 (1948), such a clause has been specifically inserted in each certificate to take care of situations such as this where the Board might reconsider and rescind the authorization granted in the original opinion. See 9 C.A.B. 401, 408.

[9] *North Central Route Investigation*, Docket No. 4603 *et al.*, Order Serial No. E-5952, adopted December 13, 1951; *Wisconsin Central Renewal Case*, Docket No. 4387 *et al.*, Order Serial No. E-5951, adopted December 13, 1951; *Frontier Renewal Case* Docket No. 4340 *et al.* Order Serial No. E-5702 adopted September 14, 1951; *All American Airways, Inc., Suspension Case*, 10 C.A.B. 24, 27-28; *Caribbean Area Case*, 9 C.A.B. 534, 545-554.

As between choosing Western or one of the two local service carrier applicants, a decision is not difficult to reach. The considerations involved in our well-established policy favoring the award of local service routes to local service operators rather than trunk operators are squarely applicable here.[10] And on previous occasions we have applied this policy where Western was an applicant for a local service route,[11] and we are not here presented with any substantial change of circumstances or any new reasons justifying a different conclusion. Moreover, the history of Western's service to El Centro and Yuma [12] is such as to warrant an adverse conclusion as to Western's willingness to operate a truly local service route.

Even though Western could operate the local air service we find required by the public convenience and necessity, at a lower cost to the government, we may not permit that fact to be decisive. For if relative cost were the dominant criterion for the award of a new local air service, it would put an end to our policy of favoring independent local service carriers to operate local service routes.

Similarly, the conclusion that Western can offer more through service to the communities on the local service route than either of the other applicants does not especially buttress its case since it would be the rare instance where a trunk with its greater route mileage and number of communities served would not offer a through service to more traffic than would a feeder applicant for the same route. Thus, if this factor were to be considered decisive, the trunk applicant would ordinarily succeed to a local service route rather than the local service carrier applicant most qualified to render the local air service.

For these reasons, we conclude that one of the local service carrier applicants for the route should be preferred to

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[10] See, for example, *Rocky Mountain States Air Service*, 6 C.A.B. 695, 730-31 (1946); *West Coast Case*, 6 C.A.B. 961, 981 (1946); *New England Case*, 7 C.A.B. 27, 39 (1946); *Texas-Oklahoma Case*, 7 C.A.B. 481, 502 (1946). The award of local service route No. 106 to Mid-Continent Airlines, Inc. occurred under exceptional circumstances and was not intended to be a departure from our basic policy. See *Parks Investigation Case*, Order Serial No. E-4472, dated July 28, 1950, p. 22; also *North Central Route Investigation Case*, Order Serial No. E-5952, dated December 13, 1951, pp. 4-5.

[11] *Rocky Mountain States Case, supra*, p. 733; *Additional California-Nevada Service Case, Supplemental Opinion*, 11 C.A.B. 39, 41-42.

[12] See Appendix, pp. 22-24.

Western.[13] A more difficult choice is presented with respect to selecting one of the latter applicants. No one has seriously contested Southwest's or Bonanza's fitness, willingness, and ability to conduct the required local air service, and we find that both meet the required statutory standard for the award of a route extension.

We have carefully considered the record in this proceeding in the light of the contentions of these applicants as to their relative ability to generate traffic and serve a local air service route and can find little in this regard to choose between them. Both have done a creditable job in exploiting the local service routes for which they have been certificated, and they appear equally capable of doing a similar job for the new Los Angeles-Phoenix route.

Moreover, we do not believe that the record demonstrates that this route can be more readily fitted into the route systems of either carrier for while the western end of the route is contiguous to the trade area now served by Southwest, the eastern end is contiguous to that served by Bonanza, and the cities in the center, that is, El Centro, Yuma, Blythe, and Ajo whose needs are our primary concern in this proceeding, can hardly be said to fall within the natural service orbit of either one. Nor do we believe that the selection of either carrier would impair the possibilities of integration of the carriers' routes since no matter which carrier is selected their routes would become contiguous.[14]

Southwest, in arguing for its selection rather than Bonanza, relies principally on the fact that it can operate the new service more economically. This position is supported by cost estimates submitted by Public Counsel. The estimated difference in cost of operation is 3.23 cents per plane mile in Southwest's favor.

On the other hand, Bonzana urges that it has a greater need than Southwest for additional route mileage and that this proceeding affords the most logical opportunity for strengthening its route pattern. Bonzana is one of the smallest local service carriers, having a route system of only 639 operable miles and serving only eight communities. On the other hand, while not numbered among the

[13] See pages 13-15 for additional discussion of our reasons for suspending Western's service at El Centro and Yuma.

[14] See *Southwest-West Coast Merger Case*, Order Serial No. E-5594, adopted August 7, 1951, p. 4.

largest local service carriers, Southwest is twice the size of Bonanza and serves more than four times the number of communities; the area it serves is one of comparatively high population density and wealth.[15] With these advantages Southwest has progressed considerably further on the road to economic self-sufficiency than has Bonanza.

Bonanza is now severely hampered by a lack of sufficient traffic and revenue volume over which to spread its overhead costs, and it cannot obtain maximum utilization of its aircraft. In the year ending June 30, 1951, for example, its scheduled daily aircraft utilization was only 4:24 hours, compared with an average of 6:07 hours achieved by other local service operators using DC-3 equipment, and its total operating expense reached 103.70 cents per revenue mile as opposed to an industry average of 98.86 cents. There is no contention before us that the differences indicated by these figures are due to management deficiencies or other factors within the carrier's control, and familiar as we are with the influence of size on relative efficiency and cost, we accept the carrier's contention that the award of additional route miles to its system with the traffic and revenue potential available thereon would tend to lower its system unit operating costs and thus, to improve its economic position.

To the extent that Bonanza's system unit operating costs for its present route are reduced as a result of the route extension here awarded the carrier, the Government will realize a saving in mail pay support for its current route. And, while due primarily to lower operating costs, Southwest would probably be able to operate the Los Angeles-Phoenix route with a lesser sum for mail pay support than will be required therefor by Bonanza, this advantage of Southwest's will tend to be offset by the mail pay support savings on Bananza's present route.

Thus, after full consideration of the record in this proceeding in the light of the well-established Board policies with respect to the selection of carriers to operate local air service routes,[16] and with relation to the Board's responsibilities for the encouragement and development of a self-

[15] These factors may also result in an advantage to Southwest in the comparative amount of off-line revenues which it might obtain if awarded the new segment rather than Bonanza. The amount of such revenues is not conclusively indicated by the record, but does not appear to be substantial.

[16] See footnote 10, *supra*.

sufficient and adequate air transportation system, we have selected Bonanza as the carrier to be authorized to provide the required local air service.

Our conclusion that the public convenience and necessity require the route awarded Bonanza, as previously indicated, requires suspension of Western's service at El Centro and Yuma, and suspension of Frontier's authority to serve the Yuma-Ajo-Phoenix segment which has not been activated. In reaching our conclusion as to the carrier to be selected, we considered carefully the effect on the aforementioned communities of the new routing on which they would be placed, and of the change in carrier which would be rendering the service. We think the advantages to Ajo of having a direct one-carrier service to Los Angeles and Phoenix are obvious, and are more than sufficient to offset any other advantage over Bonanza that Frontier might claim on the record before us. The advantages to Yuma and El Centro of being placed on the new routing and of being given service by Bonanza are less tangible. Yuma will be benefited by being placed upon the route system of a single carrier rather than two. The traffic potential of Yuma is not sufficient for two carriers, and it is doubtful, therefore, whether it would be given the same quality of service by two carriers as it would by one. And both El Centro and Yuma should receive improved service through being served by a local service rather than a trunk carrier. For Bonanza these points represent important traffic centers whose development warrant its best efforts whereas to Western the record indicates they were and are secondary points to which adequate service will be rendered only when some other purpose of the carrier is being served. In this connection, it bears noting that service to these points was only increased from a three times weekly frequency to twice daily after Western was placed on notice that the Board might suspend its authorization to serve the points, and thus adversely affect Western's plan for extension of its route to Phoenix.

The low priority which Western has undoubtedly given to the air transportation needs of these cities does not stem from any inherent hostility to these communities on the part of the carrier but from the fundamental economic fact that a business will ordinarily first seek to exploit the areas of greatest potential profit, leaving the others to some later period of greater relative prosperity. For similar reasons,

in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, in the long run, be better served by a local service carrier than by a trunk.

It should be further noted that service to Los Angeles, the city with which Yuma and El Centro have their greatest community of interest, over the new routing by Bonanza will be no less convenient than that currently offered by Western. For example, Western operates only one through flight a day in each direction between Los Angeles on the one hand and El Centro and Yuma on the other, the other flight requires a change of plane at San Diego.[17] Bonanza's proposed schedules provide an equally convenient and no less expeditious trip for eastbound or westbound passengers, and all flights are through flights which do not require a change of plane. Moreover, since Bonanza will not have to schedule its equipment with a view to its availability for longer more profitable hauls, it will have sufficient flexibility to permit the scheduling of service which will permit passengers from communities east of San Diego such as Yuma and El Centro to travel to San Diego and Los Angeles, transact their business and return home the same day. It is this type of scheduling which we have pointed out provides the most desirable service for communities on local air service routes.[18]

We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, i.e., on December 31, 1952, when Bonanza's certificate finally expires. However, it is possible that Bon-

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[17] According to the Official Traffic Guide for January 1952, Western has two scheduled departures from Los Angeles to San Diego, El Centro and Yuma. The first, a DC-3 flight, leaves Los Angeles at 7:20 a.m. PST and arrives at Yuma at 10.50 a.m. MST, the second a Convair flight as far as San Diego leaves Los Angeles at 1:25 p.m. PST, arrives at San Diego 2:10, leaves San Diego as a DC-3 flight 10 minutes later arriving at Yuma at 4:45 p.m. MST. The earliest flight to Los Angeles leaves Yuma as a DC-3 flight at 11:10 a.m. MST, changes to Convair equipment at San Diego and arrives at Los Angeles at 12:40 p.m. PST; the later flight leaves Yuma at 7:25 p.m. MST and arrives at Los Angeles at 8:55 p.m. PST.

[18] Western's schedules (see footnote 17, *supra*) permit a Los Angeles resident to travel to Yuma and El Centro, transact business and return the same day but do not permit the El Centro and Yuma passenger the same convenience.

anza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act [19] and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. Accordingly, Western's authority to serve El Centro and Yuma will be suspended up to and including December 31, 1952, or until final determination by the Board of a timely application by Bonanza for renewal of Segment No. 2 of its route No. 105, whichever shall last occur.

We have also considered the question of necessary restrictions on Bonanza's authority to operate the new route segment to prevent the carrier, insofar as practicable, from offering additional through service between Los Angeles-Long Beach on the one hand, and San Diego and Phoenix on the other, or between San Diego and Phoenix. At present, Bonanza has the usual local service restriction in its certificate which requires it to render service to each point between point of origin and point of termination of each flight. It will, therefore, be sufficient for this purpose if we require that trips scheduled between Los Angeles-Long Beach on the one hand and San Diego on the other shall be scheduled to originate or terminate at Phoenix.[20]

On the basis of the foregoing considerations and all the facts of record, we find that the public convenience and necessity require:

1. The amendment of Bonanza's certificate for route No. 105 to include a new segment extending between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego and El Centro, Calif., and Yuma and Ajo, Ariz., and Blythe, Calif.

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[19] Section 9(b) of the Administrative Procedure Act provides, in part, as follows: "* * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

[20] In Order Serial No. E-3597, dated November 22, 1949, the Board permitted Bonanza to overfly points on its then existing route. That order is so drawn as to apply only to the route between the terminals Reno, Nev., and Phoenix, Ariz., and would not apply to the new route segment herein awarded to Bonanza.

2. That each trip scheduled by Bonanza between the coterminal points Los Angeles and Long Beach and the intermediate point San Diego shall originate or terminate at Phoenix, Ariz.

3. That Bonanza shall not serve Ajo, Ariz., and Blythe, Calif., on the same flight.

4. Suspension of Western's certificate for route No. 13 with respect to El Centro, Calif., and Yuma, Ariz., until December 31, 1952, or until the date on which the Board shall have finally determined a timely filed application by Bonanza for renewal of Segment No. 2 of route No. 105, whichever shall last occur.[21]

5. Suspension of Frontier's certificate for route No. 93 with respect to service over segment "1" between the terminal points Yuma and Phoenix, Ariz., via Ajo, Ariz.

We also find that Bonanza is a citizen of the United States within the meaning of the Act, and is fit, willing, and able properly to perform the air transportation authorized herein and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

In addition, we find that the public convenience and necessity do not require suspension of Western's certificate for route No. 13 insofar as service to San Bernardino and Palm Springs are concerned.

We also find that the applications in this proceeding should be denied in all other respects.

An appropriate order will be entered.

Nyrop, Chairman, Ryan, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

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[21] We will allow the carrier thirty days after the effective date of its amended certificate to wind up its business at El Centro and Yuma.

APPENDIX

Excerpts from the Report of Examiner F. Merritt Ruhlen, Served August 17, 1951, in the Reopened Additional California-Nevada Service Case, Docket No. 2019, *et al.*

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In the original *Additional California-Nevada Service Case,* 10 C.A.B. 405 (1949) Southwest proposed local service in the Los Angeles-San Diego-Phoeniz area. Before that case was decided Western entered into an agreement with Arizona Airways to transfer its San Diego-El Centro-Yuma segment to Arizona Airways, Docket No. 340. In the *Additional California-Nevada Service Case, supra,* the Board deferred decision on Southwest's proposal for local service in this area pending consideration of the transfer of Western's San Diego-Yuma route to Arizona Airways. In the meantime Western filed an application, Docket No. 3768, requesting permission to suspend service on the San Diego-El Centro segment pending inauguration of service by Arizona Airways from Yuma to Phoenix; thereafter Western withdrew its application for permission to suspend service of the San Diego-Yuma segment and for the approval of the transfer of this segment to Arizona Airways, and in Docket No. 3976 applied for the extension of route No. 13 from Yuma to Phoenix. In addition Western filed an application, Docket No. 4007, for expeditious consideration of its Yuma-Phoenix application and for an exemption order authorizing Western to immediately inaugurate Yuma-Phoenix service. This application was denied by the Board by Orders Serial Nos. E-3727, Dec. 19, 1949 and E-3869, February 2, 1950.

* * * * * * * * *

But, before recommending Western it is necessary to consider its fitness, willingness, and ability to provide the proposed services. Western states that it is willing to provide any transportation required in the area in issue, but to determine its fitness, williness and ability, previous actions must be considered as well as promises for the future. An examination of Western's previous service to El Centro and Yuma is in order.

Western was prevented by World War II from inaugurating service to El Centro until 1946; at that time Western established two round trips daily to Los Angeles and gene-

rated a substantial number of passengers.[34] This service was operated for only one year. Shortly thereafter service was dropped to one round trip daily and a little later to three round trips weekly. This type of service continued until January 1950.

When Yuma was added as a certificated point Western provided that city with only three round trips weekly until January 1950 when it inaugurated two round trips per day between San Diego and Yuma via El Centro. This type of service has been continued since that time.

The type of service Western provided El Centro and Yuma during 1947 through 1949 clearly did not meet the minimum requirements for adequate service. The Board has stated that as a general rule, two round trips daily are necessary for adequate service.[35] In the original *California-Nevada Service Case*[36] the Board reiterated this rule but stated that in certain situations one daily round trip might be sufficient. But nowhere has it been indicated that three round trips weekly is sufficient for local short-haul service. This service was so useless that the Post Office Department did not designate any schedules for mail service and the traffic receded from 591 at El Centro in September 1946, with two round trips daily, to 327 during March 1947 with one round trip daily, to 97 in September, 1947, with three round trips weekly. During the 1948 survey months El Centro generated an average of 109 passengers monthly and in 1949 73. At Yuma 60 passengers were generated in September 1947, and during the 1948 and 1949 survey periods an average 55 and 26 monthly passengers, respectively. It was only after the Board had authorized Southwest to provide local service between Los Angeles and Phoenix via San Diego, El Centro, Yuma, Ajo, and other points and had ordered Western to show cause why its authorizations to serve El Centro, Yuma, San Bernardino, and Palm Springs should not be suspended that Western became interested enough in providing El Centro and Yuma with service to install two round trips daily. This belated enthusiasm appears to have resulted from three factors, none of which involved fulfilling its duty to provide these cities with the service needed. First, Western feared com-

[34] In September 1946, El Centro generated 591 passengers.

[36] North Central Case, 7 C.A.B. 639, 680 (1946).

[36] 10 C.A.B. 405, 429 (1949).

petition from Southwest on its Los Angeles-San Diego segment; second, the authorization of Southwest to provide a San Diego-Phoenix service rekindled Western's ambitions and hopes for a San Diego-Phoenix route; and third, Western feared that it might be suspended at San Bernardino and Palm Spring as well as at El Centro and Yuma.[37] Consequently, Western decided to establish more frequent schedules to the points proposed for suspension. Although Western presented no affirmative case to show that additional San Diego-Phoenix terminal-to-terminal service was needed and consented to accept a restriction on its San Diego-Phoenix operation inhibiting effective competition for San Diego-Phoenix and Los Angeles traffic, Western's protestations are not convincing. Based on Western's previous record it would appear that its primary interest in this proceeding is to obtain an unrestricted San Diego-Phoenix route and to use the local service operation as a "stepping stone" or "hat in the door" method of accomplishing this result. It can easily be anticipated that in the event this aim is achieved in this proceeding Western will return to the Board in a short time with an application requesting the lifting of the local service restriction and a story that unless supported by terminal-to-terminal traffic the El Centro-Yuma-Ajo segment will never be economically justified. Based on the record to date Western appears to be a very "reluctant dragon" when it comes to service to El Centro, Yuma, and Ajo. It should be noted that Western did not propose service to Ajo in this proceeding and has shown no interest in the air service needs of that city despite the Board's authorization of Ajo service several years ago. It has expressed a willingness to serve Ajo if the Board finds that such service is required.

Western's treatment of El Centro and Yuma is understandable if not excusible. Western at all times proposed service to El Centro and Yuma on a San Diego-Phoenix route and contended that only with such an operation could satisfactory service be provided in an economical manner. The present record appears to support that contention. When Western failed to obtain that authorization it did some experimenting in attempt to find some economical way to provide adequate service to these cities and then aban-

[37] Palm Springs and San Bernardino can be served on Los Angeles-Las Vegas flights and Palm Springs is a comparatively strong traffic producer during the winter.

doned the job as hopeless. It apparently decided to cut its operating losses on this unprofitable segment by reducing its schedules to the minimum and concentrating its equipment and efforts on more lucrative markets. This practice, if followed by a business operating in a free market, would be sound operating procedure. But the recipient of a certificate of public convenience and necessity receives not only special privileges, such as a right to operate with limited competition and the right to subsidy mail payments, if needed, but also the duty to provide adequate service.

In the

United States Court of Appeals

For the Ninth Circuit

No. 13245

WESTERN AIR LINES, INC.,
Petitioner,
vs.
CIVIL AERONAUTICS BOARD,
Respondent.

REPLY BRIEF OF UNITED AIR LINES, INC., AS AMICUS CURIAE.

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Statutes.

Miscellaneous.

* Not officially reported.

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I.

Introductory.

In its original brief filed in this proceeding as *amicus curiae,* United Air Lines, Inc., demonstrated that the Civil Aeronautics Act of 1938, as amended, does not confer upon the Civil Aeronautics Board, either expressly or by implication, the authority to suspend Western's permanent certificate of public convenience and necessity for the purpose of realigning the domestic air transportation pattern. Further, United demonstrated that the Board does not possess the power to indefinitely or permanently "suspend" Western's permanent certificate of public convenience and necessity. Finally, United established that the Board lacks authority to substitute the services

of a temporarily certificated carrier for those of a permanently certificated carrier.

The Board does not deny that its suspension of Western is part of a broad route realignment program. In fact, in its "Counter Statement of the Case" (Resp. Brief, pp. 2-8), the Board has admitted that the suspension of Western and substitution of Bonanza was based upon an established policy of favoring the award of local air service routes to local air service operators rather than trunkline air carriers (p. 6). In the *Southwest Renewal-United Suspension Case,* Docket No. 3718, *et al.,* decided on January 29, 1952, and quoted in United's brief at page nine, the Board admitted that it is engaged in such a program of route realignment. As has also been pointed out (United's brief, p. 9), the instant proceeding is merely one of more than 15 similar proceedings involving suspension of points or routes served by various carriers, all directed to a revision of the air route pattern. It must be considered as an established fact, therefore, that the suspension of Western in this proceeding is an attempt by the Board to further its realignment of the air route pattern.

Nor has the Board made any attempt to answer the argument advanced in United's brief, and also in Petitioner's, that the suspension power of Section 401(h) does not permit the realignment of the route structure as is now being attempted by the Board. That there is no valid answer to this argument has been best demonstrated by the Board's silence. In seeking to suspend Western's authority in order to accomplish such a purpose, the Board has clearly exceeded its powers.

Respondent, Civil Aeronautics Board, has taken the extreme position in its brief that it possesses what amounts to unlimited power to suspend a carrier's certificate and that its suspension of Western did not constitute a revoca-

tion of Western's operating authority even though it might be construed as an indefinite suspension. These positions are contrary to the very meaning of the express statutory language and contrary to the legislative history of the Civil Aeronautics Act. They cannot be sustained.

II.

Reply to the Argument That the Board Has Unlimited Power to Suspend a Certificate of Public Convenience and Necessity.

Stripped to its essentials, it is the position of the Civil Aeronautics Board that it has an unlimited power of suspension as long as its action is predicated upon findings of public convenience and necessity. The Board's basic position appears on page 17 of its brief, wherein it states that the statute permits the Board to suspend where the public convenience and necessity so require, and this is the *only* test. This argument oversimplifies the problem of statutory construction, which confronts this court. The power to suspend contained in Section 401(h) is not unlimited.

The standard of public convenience and necessity does not, as the Board contends, represent the only true test of the Board's power. Public convenience and necessity is the standard pursuant to which the Board's power is to be exercised once the scope of the power has been otherwise determined. A discussion of the Board's findings with respect to public convenience and necessity, therefore, leaves the question of the Board's power in this case unanswered.

Whether or not the suspension in this case is within the Board's power depends upon the purpose sought to

be accomplished. It is basic to any determination of statutory power that the exercise of that power must be examined in the light of the objects to which it is being directed. *Interstate Commerce Commission* v. *Illinois Central R. R.,* 215 U. S. 452, 470, 30 Sup. Ct. 155, 160 (1910). As stated by Vom Baur in his treatise on administrative law:

> "* * * Words must be honestly and accurately used. If a standard term such as 'unreasonable,' 'unjustly discriminatory,' 'public interest,' 'public convenience and necessity,' 'protection of investors,' etc., could be given effect as a mere combination of letters without inquiring as to its true meaning and the applicability of that meaning to a particular factual situation, there would be no bounds to the assumption of power by administrative agencies. Constitutional limitations would in their turn become empty phrases. It would be impossible to prevent agencies from exercising power not conferred in order to effectuate personal whims, ulterior motives, or other extralegal considerations, under the guise of exercising lawful powers. Under our constitutional system this may not be done". 2 Vom Baur, *Federal Administrative Law,* Section 566 (1942).

The Supreme Court in the *New England Divisions Case,* 261 U. S. 184, 189, 43 Sup. Ct. 270, 273 (1923), succinctly stated the proposition as follows:

> "An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized."

The Board's object in this proceeding is evident. It is seeking to employ the suspension power for the purpose of forcibly remaking the nation's air route structure pursuant to new policies evolved by the Board itself. Congress did not intend such result in the Civil Aeronautics Act. It was not intended that the Board should be able to sus-

pend a carrier's certificate, in whole or in part, either temporarily or indefinitely, whenever the Board changed its mind. The legislative history is clearly opposed to such "flexibility" in the route structure. Vice Chairman Ryan of the Board has stated this clearly:

> "* * * In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation, it is not surprising that Congress should impart to a certificate a certain stability by providing that it should be subject to revocation only for statutory cause *and not pursuant to a mere change of mind on the part of the Board.*" (Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity,* 15 Journal of Air Law and Commerce 377, at 385 (1948); italics added.)

The meaning of the word "suspend" itself, as well as the purpose and intent of the Act, and the congressional history surrounding this legislation demonstrate that the Board's suspension power is not unlimited. Thus, as shown in the brief of Petitioner and in the brief of United Air Lines, Inc., the power to suspend a carrier's permanent certificate of public convenience and necessity for the purpose of realigning the air route structure is inimical to the purpose of the Act and to the congressional intent. Such power, if construed to exist within the meaning of the word "suspend", would destroy the very stability of certificates of public convenience and necessity and the route stability which it was the intention of Congress to create under the Civil Aeronautics Act. It would constitute a power unprecedented in Federal legislation.

The Board's brief denies generally that its action in this case is inconsistent with the purposes of the Civil Aeronautics Act. However, nowhere does the Board cite any language of the Act or any legislative history which

supports the proposition, even remotely, that the Board possesses the power to suspend certificates of public convenience and necessity for the purpose of realigning the domestic route pattern. On the contrary, the legislative history which has been cited at length in the briefs of Petitioner and of United forcefully shows the dominant purpose to be security of certificate and of route. Such history does not support the conclusion advanced by the Board that the Act was primarily designed to establish a concept of regulated competition. The regulation of competition was ancillary to route and certificate security. Nor is it a "corollary" to the "protection" to be afforded a certificate of public convenience and necessity that the Board have, as it alleges (Resp. Brief, p. 32), the power to alter, amend, modify or suspend where the public convenience and necessity so require regardless of the purpose to be accomplished thereby. It is strange "protection" from competition indeed to eliminate Western's services and substitute those of another carrier. Such power is wholly inconsistent with the concept of a permanent certificate of public convenience and necessity which it was the desire of the framers of the Act to create. Such power does not contribute to a sound air transport system. The fact that the air transport industry has grown in strength and stability since the passage of the Civil Aeronautics Act of 1938, despite the existence of the words "alter, amend, modify or suspend" in Section 401(h), is simply because the Board has not, until recently, attempted to construe these words as conferring the power to realign the air route pattern, to substitute the services of one carrier for those of another, or to suspend a carrier's authority indefinitely. The air transport industry has grown in economic stature because up to now it has been assumed that the Civil Aeronautics Act provided for permanent certificates and route stability.

III.

Reply to the Board's Argument That It Has Not Effected a Revocation of Western's Certificate.

The Board argues (Resp. Brief, pp. 18-22) that its suspension of Western's authority to serve Yuma and El Centro is not, in fact, a revocation of Western's certificate authority. This argument is based on the contention that the Board's action is only temporary and, even assuming that its action constitutes an indefinite suspension, such indefinite suspension is not tantamount to a revocation.

To demonstrate that its suspension of Western's authority to serve El Centro and Yuma is purely temporary and is not, in fact, a revocation of Western's authority, the Board argues that the words "alter", "amend" and "modify", contained in Section 401(h), confer the power to permanently eliminate points served by a carrier and, since the Board acted only under the suspension power rather than under the power to alter, amend or modify, it could not possibly have revoked Western's authority. Such reasoning assumes the very question in issue. The fact still remains that the Board's order, though based upon the suspension power of Section 401(h), is tantamount to a revocation of Western's operating authority.

Basic to the Board's argument is the assumption that the words "alter", "amend" and "modify" confer the power to permanently eliminate or revoke a carrier's operating authority.* It is the Board's position that Section 401(h) contains two powers of revocation, one based on the standard of public convenience and necessity and contained in

*Section 401(h), quoted in full at page 10 of United's original brief, provides, in part, as follows:

"The Board * * * may alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, * * *."

the words "alter", "amend" and "modify", and the other based upon the wilful failure to observe the requirements of the Act or of the Board's orders or regulations.

Whatever the words "alter", "amend" or "modify" might mean, the Board, in suspending Western's certificate, did not act upon the basis of such authority, and Respondent's discussion of this language simply interjects matters which have no real bearing on issues before this Court. However, Respondent's argument, even on this basis, must fail. The proposition that Congress carefully spelled out the procedures and standards to be followed by the Board in revoking a carrier's authority and then in another part of the same section conferred the power to revoke pursuant to a different standard and different procedures without even mentioning the word "revoke" is completely untenable. The word "revoke" does not appear in the series "alter, amend, modify or suspend" which have as their standard the public convenience and necessity. Nor can it properly be read into such phrase. The very meaning of the words "alter", "amend" and "modify" precludes any conclusion that these words convey the power to permanently eliminate or revoke a carrier's operating authority as asserted by the Board. The ordinary meaning given to the word "alter" is, "To change in one or more respects, but not entirely; to make (a thing) different without changing it into something else; to vary; to modify; * * *." The word "amend" is defined as, " To reform, convert, or make better, * * *; To change or modify in any way for the better; to improve; to better * * *", while the ordinary meaning given "modify" in the sense used here is "To change somewhat the form or qualities of; to alter somewhat; as, to *modify* the terms of a contract." (Webster's New International Dictionary, Second Edition, 1946.) The courts have had frequent occasion to define these words, and generally it has been held

that the words "alter", "amend" and "modify" refer only to such revision as does not work a fundamental change in the character or nature of the thing being altered, amended or modified. 3 Words and Phrases 283; 316 (Perm. Edition). It would be difficult indeed to deny that the complete elimination or revocation of authority to serve a point is more than an alteration, amendment or modification of that part of a certificate.*

The attempt to read the power of permanent elimination or revocation of a certificate or any part thereof into the words "alter", "amend" or "modify" constitutes nothing more than legislation by an administrative body. It must be assumed that Congress used these words in their ordinary meaning. If the permanent cancellation or termination of a certificate of public convenience and necessity were intended to be permitted on a finding of the public convenience and necessity, it would have been easy and logical for the framers of the Act to include the word "revoke", which so concisely expresses such power, with the words "alter", "amend", "modify" or "suspend". When it so intended, this was done by Congress in Section 402(g) of the Act. In that section, Congress has provided for the cancellation or revocation of foreign air carrier permits upon the basis of the "public interest", which is also the prescribed standard for the alteration, modification, amendment or suspension of such permits. By providing that

> "Any permit issued under the provisions of this section, may, after notice and hearing, be altered, modified, amended, suspended, *cancelled,* or *revoked* by

*The Board argues (Resp. Brief, p. 19) that elimination of El Centro and Yuma from Western's certificate is not a basic transformation of that carrier's route as a whole. However, it is more than a complete change in the character—it is an elimination—of that *part* of Western's certificate. Under Section 401(h), the limitations upon the words "alter", "amend" or "modify" extend to any *part* of a certificate as well as to the certificate as a whole.

> the Authority whenever it finds such action to be in the public interest." (49 U. S. C. Sec. 482(g); italics supplied),

it is clear that Congress did not attribute the same meaning to all of these words. The argument that "alter", "amend" or "modify", as used in Section 401(h), mean the same as "revoke", in other words, to permit the permanent elimination of a carrier's operating authority, cannot be reconciled with the separate use of those words in Section 402(g) of the Act.

Section 401(g) also indicates, and perhaps does so more clearly than any other section of the Act, that the power to revoke or permanently cancel any certificate of public convenience and necessity, or any part thereof, is not included within the meaning of the words "alter", "amend" or "modify". This section of the Act provides that, "Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided * * *." This language expressly states that certificates of public convenience and necessity shall be permanent unless terminated according to the named procedures set forth—the suspension and revocation referred to in Section 401(h) of the Act. If the words "alter", "amend" or "modify" had been intended to include the power to revoke a certificate in whole or in part, these words would also have been set forth in Section 401(g) as conditions which might bring about the termination of a certificate.

As demonstrated in the original briefs of Petitioner and of United, the Board's suspension of Western's authority to serve El Centro and Yuma and the substitution therefor of Bonanza is, in fact, a revocation of a part of Western's certificate of public convenience and necessity. The purpose of such "suspension" was to effectuate a new policy favoring the operation of feeder carriers on local

routes, a policy which is coextensive with the existence of feeder carriers. Keeping such policy in mind, the conclusion that Western's "suspension" is indeed revocation is confirmed by the following statement appearing in Respondent's Brief (p. 20):

> "The Board fully recognizes that the temporary certificate of Bonanza may well be renewed. The Board has many times expressed its hope and confidence in the success of the local air service experiment and *it would not likely have provided a service which it thought would so soon come to an end.*" (Italics supplied.)

The Board asserts that the proposition that its action constitutes a revocation is based simply upon speculation. However, in arguing that there may be changes in the future in Bonanza's authority which would mean a return of Western's service, the Board is itself asking the Court to speculate concerning its future actions. In view of the statements of the Board in opinions and orders and the statements of Board members in public speeches, the conclusion that Western's suspension must be considered as permanent is not speculative. The following quotation from the speech of Chairman Donald W. Nyrop, delivered on June 22, 1951, shortly after he was appointed to the Board, eliminates the necessity for speculation on the part of Petitioner or this Court:

> "I believe that the commercial air route pattern of the United States has evolved naturally into a two-level structure; that is, the structure on the one hand of the major trunkline air operations and on the other hand of the local air service serving small cities and towns on comparatively short-haul operations. As we progress farther into the future with air travel becoming more and more necessary and usable, I believe that the judgment of the Civil Aeronautics Board in laying the foundation for this secondary short-haul

air transportation will be more than justified. *The local scheduled air carrier operation has come to stay.*"* (Italics supplied.)

If any doubt still remains, it should be noted that on March 13, 1952, the Board issued its tentative findings and conclusions in the matter of Bonanza's mail compensation and proposed therein that depreciation on certain of that carrier's ground equipment be extended from the current rate of three years to twelve years (Order, Serial No. E-6211).

There is no speculation in Western's viewing the facts as they really are. They cannot be avoided. Rather, it is the Board's position which is speculative in urging the Court to rely upon a remote *possibility* that Western's authority may be restored.

Moreover, even assuming the duration of Western's suspension to be speculative, this very fact militates against the legality of the Board's action. An indefinite suspension, a possibility which the Board is willing to recognize (Resp. Brief, pp. 21-22), is beyond the powers of the Board. To claim the right of indefinite suspension violates the very meaning of the word "suspend." Suspension represents only a *temporary* withdrawal (United Brief, p. 24). An indefinite "suspension" is not a temporary thing but may well be permanent. It is the Board's theory that as long as there is a possibility of reverter, withdrawal of authority is authorized by the Act. But of what value is such possibility if it may be postponed indefinitely? Member Lee of the Board has recognized that an indefinite suspension has the same effect as a revocation (United Brief, p. 27). *The Board cannot stand before this Court and state that Western's authority to serve Yuma and El Centro*

*Nyrop, *The Civil Aeronautics Board and Local Air Service*, Address before the Local Service Airline Seminar, Purdue University, Lafayette, Indiana, June 22, 1951. See also United Brief, pp. 28-29.

will be restored. Nowhere in its brief is there contained any such statement or promise.

Western is not protected by its right to a full administrative hearing and the right of court review before extension of its present suspension can be ordered, as Respondent urges (Resp. Brief, p. 35). Such right is poor solace as far as Western is concerned. Moreover, if such argument is valid, what protection does the carrier have? The next time around it would be the same thing over again. Presumably, the same policy considerations would dictate continuance of the suspension and when Western again sought review, the same argument of right to a hearing and judicial review would be raised for its defense. This Court should not permit the Board to use the availability of judicial review as a tool to make a mockery of the Civil Aeronautics Act.

IV.

Reply to the Argument That the Board's Action Meets the Standard of Public Convenience and Necessity.

Although the Board appears to have gone beyond the issues before this Court in seeking to argue the factual justification for its action, its argument demonstrates that the Board has exceeded its powers in here suspending Western's certificate of public convenience and necessity. As stated in its Brief (Resp. Brief, pp. 27-28), the reasons for the Board's action fall into two main categories, first, the Board's general policy that local air service be operated by local air carriers rather than trunk-line carriers and, second, that Western in the past has failed to render adequate local service to El Centro and Yuma.

The Board's power of suspension based upon the standard of public convenience and necessity is not a device by

which the Board can substitute the services of one carrier for those of another based simply on the theory of establishing a new type of local air carrier. Such power as the Board may have to suspend a carrier's operating authority under Section 401(h) of the Act must be predicated upon the finding that the public convenience and necessity no longer require the air service being provided. The Board does not state that it found that air service is not required to Yuma and El Centro and, therefore, that the suspension of Western is justified. On the contrary, because of a change in its policy—which previously had justified the authorization of Western to serve El Centro and Yuma—it has found that such air service is required but should now be provided by another carrier. *As long as the public convenience and necessity require air transportation between points served by a carrier, its suspension is not authorized under the Act.*

The Board seeks to bring its action within the standard of public convenience and necessity by asserting that it found that El Centro and Yuma require local air service and that such service could be provided better by Bonanza than by Western. The issue of which carrier could best provide the needed service concerns the selection of carrier rather than whether the public convenience and necessity require the service involved. In its route proceedings, the Board has consistently, since its inception, treated the issues of public convenience and necessity and selection of a carrier separately. *Braniff Air, Houston-Memphis-Louisville Route,* 2 C. A. B. 353, 380 (1940); *Continental A. L. et al., Texas Air Service,* 4 C. A. B. 215, 233 (1943); *Arizona-New Mexico Case,* 9 C. A. B. 85, 94 (1948).

The Board is not without power in the premises. The suspension of Western and substitution of Bonanza was not the only course available to the Board to provide local

air service to El Centro and Yuma. If Western's service in the past was indeed inadequate, as the Board claims, it could have required Western to provide adequate local service under the terms of Section 404(a) of the Act.* Service by trunkline carriers, so called, does not differ so markedly from feeder carrier service, as the Board would have the Court believe, to preclude the application of Section 404. Trunklines do not serve solely terminal-to-terminal traffic on a non-stop basis. In fact, there is no domestic trunkline in existence which does not provide a substantial volume of strictly local traffic.** If, in addition, the Board felt that new local air service is required for Yuma and El Centro, it could have authorized the added competition of Bonanza, assuming that such competition would not have been excessive. However, the Board, by its own action in creating competition, cannot state that such concurrently created competition is a reason for ousting Western.

The Board's explanation of its action (Resp. Brief, pp. 27-28) further reveals that the suspension of Western was largely punitive for failure to render adequate service in the past. As a punitive action, the Board's order is clearly invalid because such action is not only not based

*Section 404(a) of the Civil Aeronautics Act of 1938 reads as follows:

"It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

**A comparison of the restrictions upon Bonanza's service set forth on page 25 of Respondent's Brief with those contained in Western's certificate of public convenience and necessity (Appendix to Petitioner's Brief, pp. 67-68) reveals very little real difference. The Board has also permitted feeder carriers to engage in nonstop and skipstop operations.

on public convenience and necessity but fails to meet the requirements of Section 401(h) for the termination of operating authority on such basis.

V.

Reply to the Argument That Western's Interpretation of the Board's Suspension Power Is Too Narrow.

The Board complains that the scope of the suspension power as defined in Western's brief, namely, that suspension may be used to discontinue temporarily a carrier's services when traffic volumes no longer warrant air service,* represents too narrow a limitation upon the Board's suspension power. But, however much the Board may desire broader authority so that it might have unlimited regulatory control over the air transport industry, such broad power cannot simply be read into the Act by implication or as a matter of convenience.

Western's interpretation is consistent with the purpose of the Act as a whole and the legislative history surrounding it. Respondent's Brief notably presents no reference to the express language of the Act or to the legislative history which demonstrates to the contrary. Nor do the cases decided by the Board itself, and which are repeatedly recited in its brief, provide the Court with any precedent. "* * * it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it." *Interstate Commerce Commission* v. *Railway Company,* 167 U. S. 479, 17 Sup. Ct. 896, 904 (1897). Neither does the case of *Pan American-Grace Airways* v. *Civil Aeronautics Board,* 178 F. 2d 34 (C. A., D. C., 1948), cited in Respondent's Brief,

*This is also United's interpretation of the meaning to be given to Section 401(h). See United's Brief, pp. 34-35.

establish the necessity for a broad interpretation of the Board's power to suspend. The court's quoted statement therein (Resp. Brief, p. 30) referring to the Board's suspension power was purely *obiter dictum* and as such has no real validity as precedent. The issue there before the court was whether the Board could properly dismiss a complaint without holding a hearing thereon or submitting the matter to the President. Apart from the fact that the quotation represents only *dictum,* the court's statement does no more than recite the Board's general power of suspension set forth in Section 401(h) of the Act. It does not go into the question of the Board's authority to employ the suspension power to effectuate a realignment of the air transport route pattern, to substitute the services of one carrier for those of another or to suspend a carrier's services for an indefinite period so as to bring about, in fact, a revocation. The suspension proposal involved in that case, which did not even come to trial, was for a definite five-year period and did not involve the substitution of the services of one carrier for those of another.*

In support of its claim to broad and, in effect, unlimited suspension power, the Board refers to the *Caribbean Area Case,* decided by it in 1948, in which the Board pointed to various consequences which might occur in the absence of a broad suspension power.** As stated above at page 16, the Board cannot confer jurisdiction upon itself sim-

*Respondent's Brief construes the single sentence in the court's entire opinion as sanctioning suspension solely for competitive reasons (Resp. Brief, pp. 30-31). However, it should be noted that the court, in a footnote, stated that the facts alleged in behalf of the requested suspension included, "(1) that economic conditions have so changed since the certificate was granted that an additional airline would be inadvisable, since an uncontemplated increased financial burden would fall upon both the Government (through increased mail subsidy payments) and Braniff."

**Because this case has been cited several times in Respondent's Brief, it should be noted also that the Board's action therein did not result in the suspension or elimination of any point contained in Pan American's certificate of public convenience and necessity but only in the amendment of the terms, conditions and limitations applicable to the air service authorized.

ply by the citation of its own opinions. Its assumption of power in the *Caribbean Area Case* was never put to the test of court review. However, apart from this, it should suffice to point out that the problems which the Board there envisioned are not involved in this case. Unlike the possibility contemplated in the *Caribbean* case, there have been no changes in the facts here, thereby effecting the soundness of any prior Board judgment. The change here is simply an attempt to apply a new policy which the Board now seeks to establish favoring feeder carriers over trunkline carriers. Furthermore, unlike the facts confronting the Board in the *Caribbean* case, this case does not represent one in which the stronger carrier is attempting to overpower a weaker carrier. Prior to the Board's opinion and order which is being reviewed, Bonanza did not compete with Western. The Board's discussion in the *Caribbean Area Case* of possible problems which might arise in the absence of an unlimited suspension power should properly have been directed to Congress and are not reasons for the extension of the suspension power conferred in Section 401(h) beyond the purpose intended as revealed by the ordinary meaning to be given to the statutory language and by the legislative history of the Act. Neither are such reasons properly directed to this Court in support of the Board's position. If the Board is to have unlimited power to eliminate a carrier's service based only on what it considers from time to time to be required by a new interpretation of public convenience and necessity, then such power must come, if at all, from the Congress.

Conclusion.

Despite the clear-cut purpose of the Act and despite its legislative history, the Board is claiming in this proceeding a suspension power limited only by what the Board

may construe from time to time as being in the public convenience and necessity. It claims the power to suspend a carrier's permanent certificate for the purpose of realignment of the domestic route structure, to suspend one carrier and substitute therefor the services of another carrier for the implementation of new policies, and to suspend indefinitely the services of a permanently authorized carrier without regard to the express limitations upon the Board's power of revocation. Such broad power over permanent certificates of public convenience and necessity is unprecedented in any Federal legislation and there is nothing in the Civil Aeronautics Act which confers unlimited power of this nature upon the Board, either expressly or by implication: Nor can it be supplied by administrative or judicial legislation. Accordingly, the Board's suspension of Western's services at Yuma and El Centro must be set aside as being beyond the powers conferred upon it by the Civil Aeronautics Act.

Respectfully submitted,

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Dated: April 17, 1952.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this day served the foregoing Reply Brief upon Western Air Lines, Inc., the Civil Aeronautics Board, Bonanza Air Lines, Inc., Mid-West Airlines, Inc., and Wisconsin Central Airlines, Inc., by mailing to their respective attornies of record three copies thereof, properly addressed, with postage prepaid.

Dated at Chicago, Illinois, this 17th day of April, 1952.

JOHN T. LORCH,
Attorney for United Air Lines, Inc.

No. 13245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY BRIEF OF WESTERN AIR LINES, INC.

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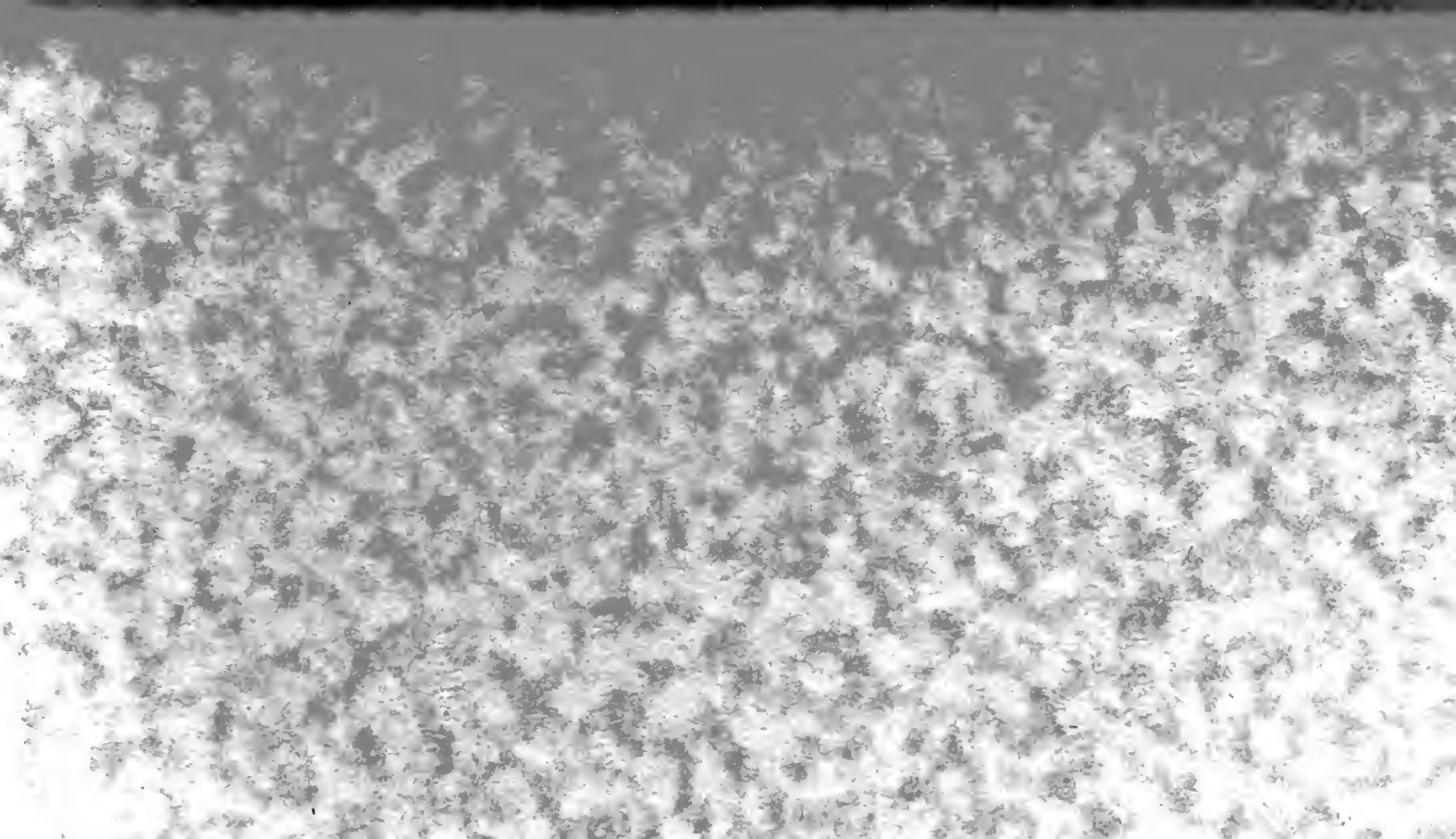

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REPLY BRIEF OF WESTERN AIR LINES, INC.

Initial Statement.

In its opening brief Western urged two basic principles on which it relies for a reversal of the Order being challenged. The first was that the Order, in fact, amounted to a revocation in part of Western's Route 13, notwithstanding the language employed in an effort to color the act as a suspension, and that the revocation provisions of Section 401(h) of the Act had not been met. The second was that even though the effect of the Order were temporary, and thus a suspension rather than a revocation, the suspension provisions of Section 401(h) do not vest in the Board the power to remake or reshuffle the national air route pattern, in whole or in part.

Neither the brief of the Board nor the brief of Bonanza has presented a valid answer to the principles urged by Western. However, the Board has come forth with what appears to be a suggestion that Section 401(h)

(suspension and revocation of an existing certificate) may be merged with Section 401(d) (issuance of a new certificate), whereby an existing carrier may be taken out of a part or all of a route and a new carrier installed. This theory, if it be the theory urged by the Board, is not good law and calls for comment.

In addition to the two basic principles, Western pointed out that the Order under review is in violation of the Fifth Amendment of the United States Constitution. The Board contends that this point was not urged below and thus must be rejected here. Although Western continues to place only secondary reliance on this proposition, since each of the two basic principles appears to be controlling, the error of the Board's contention will be noted.

SUMMARY OF REPLY ARGUMENT.

1. The Powers Conferred by Section 401(d) and Section 401(h) Are Separate and Must Be Exercised Independently.

The power of the Board to grant a new certificate, permanent or temporary, under Section 401(d), in response to the public convenience and necessity, must stand or fall on its own. The exercise of the power to grant a new certificate or to add to an existing certificate may not be conditioned upon some other act with respect to another air carrier being done concurrently under an independent power.

The power of the Board to order air service discontinued at existing points by amendment or suspension under Section 401(h), in response to the public convenience and necessity, must stand or fall on its own. The exercise of the power may not be conditioned upon

some other act with respect to another air carrier being done concurrently under an independent power.

Bonanza would not have been certificated into El Centro and Yuma unless concurrently Western had been "suspended" out. By the same token, Western would not have been "suspended" out of El Centro and Yuma unless concurrently a new certificate including El Centro and Yuma had been issued to Bonanza. This involuntary shifting of an air route from one air carrier to another is illegal under the Act.

2. The Board May Not Amend a Certificate Under Section 401(h) in a Manner Which Would Cause a Transformation in the Character of the Route.

Even though the Board were within its rights in creating an entirely new section of the Act by merging Section 401(d) with Section 401(h), the power to amend does not include the power to destroy or transform a route. By "amending" or "suspending," whichever may be the case, El Centro and Yuma out of Western's Route 13, the Imperial Valley operation has been eliminated. In principle, this involves the destruction of an entire route and under any approach it involves a basic transformation of Western's Route 13.

3. Section 1006(e) of the Act Does Not Bar Consideration by This Court of the Constitutionality of the Board's Order.

Western did object below to any infringement of its rights under the Fifth Amendment to the United States Constitution in a fashion adequate to permit the point to be urged here.

Should it be held that the point was not urged below with sufficient clarity, the failure must be excused. The Order challenged, dated January 17, 1952, is the second reopened Order of a proceeding which was first heard in 1947. A petition for a third reopening to emphasize the constitutional question would have served only to add further delay to a decision already inordinately delayed.

REPLY ARGUMENT.

1. The Powers Conferred by Section 401(d) and Section 401(h) Are Separate and Must Be Exercised Independently.

(a) Preface.

The main contention urged under this heading is that the Board's position in justification of the Order amounts to a rewriting of the Act by adding a new section containing powers which would result from merging Section 401(d) with Section 401(h).

Neither the Board nor this Court has the power to rewrite the Civil Aeronautics Act. On page 22 of its brief the Board protested that if the validity of a suspension under Section 401(h) were determined on the question of the length of the suspension, the statute would have to be rewritten. This observation by the Board is sound. It is just as sound to protest that a meshing of Section 401(d) with Section 401(h) would involve rewriting the statute.

(b) A New Certificate Under Section 401(d) Can Be granted Only If the Public Convenience and Necessity Require the Transportation Covered by the Application.

On page 15 of its brief the Board noted that its power to alter, amend, modify or suspend an existing certificate under Section 401(h) is based on the same standard of public convenience and necessity under which the Board has the power to grant new certificates under Section 401(d). Western endorses the accuracy of this declaration.

Section 401(a) of the Act provides that no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board. Sections 401(b) and 401(c) require that the application for a certificate be made in writing and that after notice and a public hearing it be disposed of as expeditiously as possible. Section 401(d) provides for the issuance of a certificate (permanent or temporary) authorizing the whole or any part of the transportation covered by the application, if required by the public convenience and necessity.[1] There is no provision in these sections, or elsewhere in the Act, authorizing the Board to issue a new certificate "upon petition or complaint or upon its own initiative," as is provided in Section 401(h), for the alteration, amendment, modification or suspension of a certificate.

It is important to note that Section 401(d) provides that the Board shall issue a certificate authorizing the whole or any part of "the transportation covered by the application" if it finds that "such transportation is re-

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[1]For convenience, Section 401 in its entirety is set forth in Appendix A to this Reply Brief.

quired by the public convenience and necessity; otherwise such application shall be denied."

Nowhere is there any provision in any subsection of Section 401, or elsewhere in the Act, under which an application for a new certificate can be granted on condition that some other certificate be amended, suspended or revoked, either in whole or in part, under Section 401(h), or that some other certificate be transferred under Section 401(i), or that some other certificate be abandoned under Section 401(k).

Section 401(f) provides for the inclusion in any certificate of "such reasonable terms, conditions and limitations as the public interest may require." This manifestly does not include the right of the Board to grant a new certificate with a condition that the privileges under the new certificate may be exercised only if some other certificate should be altered, amended, modified, suspended or revoked under Section 401(h) or transferred under Section 401(i) or abandoned under Section 401(k).

If the public convenience and necessity do not require the transportation covered by the application, standing alone and independently of what the Board might do or might be able to do under some other section of the Act, the application must be denied. Section 401(d) would have to be rewritten or a new section added to permit any other interpretation.

The Board concedes that the public convenience and necessity would not have permitted, let alone required, the certification of Bonanza into El Centro and Yuma unless Western had been "suspended" out.

(c) The Amendment or Suspension of an Existing Certificate Under Section 401(h) Cannot Be Predicated Upon a New Certificate Being Granted or Upon Some Voluntary or Involuntary Action With Respect to Some Other Certificate.

Section 401(h) gives the Board the authority upon petition or complaint, or upon its own initiative, to alter, amend, modify or suspend "any such certificate (new certificates issued under Section 401(d)) in whole or in part if the public convenience and necessity so require, . . ." Here, as under Section 401(d), the authority of the Board to act is independent and must stand on its own.

The amendment of an existing certificate by deleting a point or segment, or the suspension of an existing certificate in whole or in part, cannot be dependent upon the concurrent granting of a new complementing certificate to some other air carrier under Section 401(d) or upon the transfer of some other certificate under Section 401(i), or upon the abandonment of some other certificate under Section 401(k).

It need not be decided now whether the alteration, amendment or modification of a certificate must be permanent, as the Board asserts. But assuming that to be so, the Board can only amend a certificate by deleting an intermediate point or a segment if the public convenience and necessity *no longer require service at that point or on the segment.* If the public convenience and necessity do require the service at the point or on the segment in question, it would be contrary to the public convenience and necessity to discontinue service permanently by amendment or temporarily by suspension.

The Board has recognized the verity of this proposition. In the *All American Airways, Suspension Case,*

10 CAB 24 (which is quoted on page 24, footnote 28, in the Board's brief), this was said:

> "We recognize that there is a possible abuse of discretion in an administrative agency in attempting to discipline a carrier by suspending its certificate on the basis of facts which would not justify a revocation. However, it seems apparent that where the record developed after extensive hearing *clearly indicates that the public convenience no longer require a service,*[2] such substantive test is sufficient to prevent any abuse, particularly where procedures remain open, as they do here, whereby interested parties may seek termination of the suspension by the Board."

The Board does not contend that air transportation is not required by the public convenience and necessity at El Centro and Yuma. To the contrary, the Board's entire case is based on the claim, or, perhaps better, the admission, that the public convenience and necessity continue to require air transportation, but that for the time being, and perhaps indefinitely (Board's Br. p. 20), Bonanza should provide the service rather than Western.

The Board concedes that Western would not have been "suspended" out of El Centro and Yuma unless Bonanza had been certificated in.

Section 401(h) does not vest this power in the Board. To give the Board the power it claims it would not be sufficient to rewrite Section 401(d) or Section 401(h). It would be necessary to write an entirely new section embodying a combination of both sections.

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[2]Emphasis in quoted material is added throughout unless otherwise noted.

(d) A New Section Would Have to Be Added to the Act to Give the Board the Power It Claims.

It is Hornbook law that an administrative agency has only the powers conferred upon it by Congress.[3]

The new section which would have to be added to the Act before the Board would have the power to do what it seeks to do here would mesh together the essential features of Sections 401(d) and 401(h), and might read somewhat along these lines:

> "Authority to Issue a New or Amended Certificate in Lieu of an Existing Certificate.
>
> The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify or suspend two or more such certificates, in whole or in part, by providing that the transportation authorized by any one of such certificates shall be eliminated, in whole or in part, and added, in whole or in part, to one or more others of such certificates, or included in one or more new certificates, if the public convenience and necessity so require. The Authority [Board] shall have the power under this Section to redesign from time to time the national air route pattern, and, if the Authority [Board] establishes classifications or groups of air carriers under Section 416, the Au-

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[3]"The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy." *Arrow-Hart & Hegeman Electric Co. v. F. T. C.* (1933), 291 U. S. 587, at 598, 78 L. Ed. 1007, at 1013.

> thority [Board] may transfer any such certificate in whole or in part from an air carrier in one classification or group to an air carrier in another classification or group, or from one air carrier to another air carrier in the same classification or group, if the public convenience and necessity so require. No air carrier shall be deprived of property or property rights under this Section without just compensation. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, transfer or issuance of a certificate under this Section."

A section containing this language would give the Board the power to recast the national air route pattern and the power to shift existing air transportation service from one carrier to another. Without a section reading somewhat as the sample does the Board does not have the power to do what it attempted to do here.[4]

It may be that it would be entirely proper and fully in keeping with the public interest that the Board have the great power it now claims. Perhaps it would be in the public interest if the Board had the authority to tell

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[4]On page 30 of its brief the Board has cited and quoted from *Pan American-Grace Airways v. Civil Aeronautics Board,* 178 F. 2d 34 (C. A., D. C., 1948), in support of its position. It is thought that reference to this case by the Board must have been with tongue slightly in cheek. Panagra had filed a petition with the Board to suspend Braniff's South American certificate. The Board dismissed the petition without acting on it. The only issue on appeal was the Board's order dismissing the petition. The court noted at page 36, "The Board's decision simply was that the petition did not warrant the inquiry, a ruling tantamount to a court's order sustaining a demurrer to a petition or complaint."

Western that its service at El Centro and Yuma was feeder in nature and should be operated by Bonanza, or to tell United Air Lines that its service from San Diego to Seattle was regional in nature and should be operated by Western, or even to tell American Airlines, Trans-World Air Lines and United Air Lines that it would be more in keeping with the public interest to have their three trans-continental services consolidated into one. But Congress, not this Court, is the forum in which the merits of such extraordinary power should be debated.

The fact remains that the Act does not grant the power the Board claims. If Congress had intended to vest in the Board the power to remake the air map or to shift service from one air carrier to another or from one class to another class, that power would not have been obscured in the language used in Section 401(h). Mr. Justice Clark recently made this apposite remark in *Brannan v. Stark,* 72 S. Ct. 433 (March 3, 1952), at page 439:

> "We do not think it likely that Congress, in fashioning this intricate marketing order machinery would thus hang one of the main gears on the tail pipe."

Had Congress intended to give the Board the power, now requisitioned by it, to shift routes or stations from one air carrier to another, or to eject one air carrier from a station or an area in favor of a new air carrier or another existing air carrier, or to redesign the national air route pattern, unmistakable language to that effect would have to be employed, since such a broad and extraordinary power would be one of the main gears of the Civil Aeronautics Act. That gear would not have been hung on the "suspension" tail pipe.

(e) The Construction of Section 401(h) Urged by the Board Would Negate Other Sections of the Act.

As added support for its argument that the Board's Order amounts to revocation and not simply suspension, commencing on page 20 of its opening brief, Western quoted the Board's order instituting an investigation to determine whether an integration of the routes of Southwest and Bonanza into a single unified system would be in the public interest. It was argued that the order instituting the investigation would not have been issued had not the Board thought real merit existed to the consolidation of the two systems and that were they consolidated Bonanza's "temporary" route between Phoenix and Los Angeles most certainly would become permanent.

In an attempt to soften the implications of that disclosure, Bonanza pointed out that the Board's power with respect to mergers, consolidations or acquisitions of control stems from Section 408 of the Act.[5] This statement is found in Bonanza's brief, commencing on page 26:

> "Moreover, and this should be of particular interest to the court, the Board has no statutory authority to order a merger. The Board's power with respect to mergers is derived from Section 408 of the Act, and is subject to the requirement that an *application*[6] for merger, consolidation, acquisition of control, etc., must be submitted to the Board for approval, and a public hearing must be held thereon.
>
> "The Board's power in this respect does not therefore come into being until an application is submitted

[6]Emphasis included.

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[5]A copy of Section 408 of the Act in its entirety appears as Appendix B to this Reply Brief.

for its approval. The statute does not confer any authority on the Board to initiate a merger proceeding. Thus, in effect, the Board has only a ratification power and a veto power with respect to mergers, consolidations, etc."

Bonanza is quite correct in its interpretation of Section 408. The Board does not have the power to force a consolidation or merger of air carriers any more than the Board has the power to redesign the national air route pattern, in whole or in part. But if the Board could do under Section 401(h) what it has professed to do here, it could force a consolidation, merger or acquisition of control just as effectively and just as quickly as it could if Section 408 gave the Board the affirmative implementing power rather than simply the negative vetoing power.

Inasmuch as the Board has initiated an investigation concerning the desirability of unifying the systems of Southwest and Bonanza by means of merger, consolidation, acquisition of control or route transfer, the background for a good example is offered. If, following completion of that investigation, the Board were to determine that the public interest would be served by unifying the two systems, it would be necessary only for the Board to suggest to the two feeder air carriers that this be accomplished voluntarily and promptly. If either air carrier should demur, it would be necessary only for the Board to initiate a proceeding under Section 401(h), and, after giving notice and holding a perfunctory hearing, order Southwest's route (or Bonanza's) suspended in whole, and Bonanza's (or Southwest's) amended to include the suspended route. After sufficient time had passed—perhaps five years, maybe ten years—to reach

the danger point of having the suspension construed as revocation, the Board could rely on the suspended air carrier having withered away to a noncombative status.

Assuredly, this would not be a worthy use of a self-implemented weapon. But if the Board can eject Western from its Imperial Valley Route and install Bonanza in that route under its interpretation of Section 401(h), it can use the same interpretation to override Section 408.

Section 401(i), which is included in Appendix A, provides that no certificate may be transferred unless the transfer is approved by the Board as being consistent with the public interest. Here again, the Board's power is negative only. The Board does not have the direct power to compel an air carrier to transfer one of its certificates to some other air carrier.

Section 401(k), likewise in Appendix A, provides that no air carrier shall abandon any route or any part of a route for which a certificate has been issued unless upon *application of the air carrier,* after notice and hearing, the Board shall find the abandonment to be in the public interest. Here, too, the Board has only the negative vetoing power, not the affirmative implementing power. But once again, if the Board's interpretation of Section 401(h) be accepted by this Court it could force under Section 401(h) the equivalent of an abandonment, which it is prohibited from doing directly under Section 401(k).

No executive branch of the federal or a state government is legally allowed to do by indirection that which it

is not authorized to do directly.[7] A judicial bulwark against an invasion of this principle of law becomes doubly important when a statute is not just silent, but speaks against a power, as in the Civil Aeronautics Act with respect to compelling a merger of air carriers, a transfer of a certificate and the abandonment of a certificate.

At this point it is well to note that Congress withheld giving the power to the Board to act affirmatively in several specific situations, regardless of the public convenience and necessity. Without room for doubt, there exist today instances where the merger of two or more air carriers would be greatly in the public interest. Unquestionably, the public convenience and necessity would be served in high degree if some existing permanent certificates could be transferred in whole or in part from the holding air carriers to other air carriers. But the power to accomplish objectives of this nature, however much they might be in the public interest, was not conferred upon the Board by Congress. Thus the Board's argument, which seems to be implicit here, that Congress must have given the Board the power to act affirmatively wherever and whenever, in the Board's opinion, the public convenience and necessity would be fostered lacks substance as well as legal merit.

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[7] *In re Robelen*, 3 Del. 314 (1926), 136 Atl. 279, at 280, the Superior Court of Delaware said:

> "It [statute] will not be so construed as to allow to be done by indirection what may not be done directly."

In *Sharp v. State*, 54 Ind. App. 182 (1912), 99 N. E. 1072, at 1076, the court noted:

> "To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined."

2. The Board May Not Amend a Certificate Under Section 401(h) in a Manner Which Would Cause a Transformation in the Character of the Route.

(a) The Restricted Powers Under Section 401(h) Are in Keeping With the Objectives of the Act.

In its opening brief, commencing on page 35, Western acknowledged that under Section 401(h) the Board does have the power under some circumstances to suspend a certificate in whole or in part. As examples of the proper application of the suspension power, reference was made to a once sizable and prosperous community becoming impoverished and depopulated because of the exhaustion of nearby mines or because of the decommissioning of a major army base. Nothing in the briefs of the Board, Bonanza or Midwest and Wisconsin Central lends conviction that the interpretation placed by Western on the suspension power under Section 401(h) can be enlarged to empower the Board to order the equivalent of a transfer of a certificate, the abandonment of a certificate, or the merger or consolidation of the systems of two air carriers.

If, for a temporary or indeterminate period, the public no longer needs air transportation at a given point or in a given area, it is right that the Board on its own initiative should be able to compel the suspension of that service, or, under an application, permit it. It is right that upon the removal of the condition which justified the suspension the suspended air carrier be restored to its rights and privileges. But if the public still needs the air transporation being provided by a certificated air carrier, it is not the right that the Board, under the guise of Section 401(h) or otherwise, should be able to suspend the opera-

tions of that air carrier and install another air carrier on the supposition that the other air carrier might do a better job or a cheaper job (or, perhaps, as here, a more expensive job) than the existing air carrier.

(b) The Amending Powers Under Section 401(h) Are Limited.

In its brief, commencing on page 18, the Board contended that its alternative was not "suspension" against "revocation," but rather "suspension" against "alteration, amendment or modification." The implication, if not the direct assertion, is that alteration, amendment or modification is permanent, and, therefore, greater than suspension, which is temporary. From this the reasoning is implied that the greater includes the lesser, and that the Board could have amended the Imperial Valley Route out of Western's system instead of "temporarily" suspending it out. It thus becomes proper to discuss the extent of the Board's power to alter, amend or modify a certificate in whole or in part under Section 401(h).[8]

At the outset it is conceded, but only for the purposes of this argument, that the alteration, amendment or modification of a route under Section 401(h) must be permanent. Otherwise the addition of the right to suspend in whole or in part would seem to be surplusage.

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[8]In accepting the challenge of debate, Western does not agree that under the Board's own theory its alternative was "suspension" against "alteration, amendment or modification". Since the Board elected to continue the masquerade of an impermanent experiment concerning feeders, it could not have "altered, amended or modified" Western out of El Centro and Yuma and still have issued a purportedly temporary certificate putting Bonanza in those two points. Nonetheless, it is proper to point out that even though the Board had had the alternative it claims, it would not have had anymore legal right permanently to amend Western out of El Centro and Yuma than it had "temporarily" to suspend out those points.

The Board, commencing on page 15 of its brief, acknowledged that its right to alter, amend or modify a certificate is limited to such changes as would not work a basic transformation in the character of the route. Hence, it is not necessary to argue that the term "in whole or in part" refers back only to "suspension" and not to "alter, amend and modify."[9]

Although the Board's concession removes the need for any debate that the amending power cannot be used to transform a route, note should be made of the significance of this limited power. Conceivably, an entire air route could become valueless to the public, Still, Congress did not deem it appropriate to give the Board the power permanently to cancel such a route. This increases the stature of Western's insistent contention that stability of certificates is a predominating objective of the Act.

It is not necessary in this proceeding to place a rigid hedge around the powers Congress intended to confer by using the words "alter, amend and modify" in the first part of Section 401(h). Western agrees with the Board, and the obvious, that a permanent alteration, amendment

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[9]In *Cross v. Nee*, 18 F. Supp. 589, at 594 (D. C., Mo., 1936), the three words are defined in this manner:

> "To 'amend' is to change for the better by removing defects or faults. It refers to that which falls short of excellence. To 'modify' is to make different by change of quality. To 'alter' is to change partially. To 'change' is much broader than the others, and means to make a thing distinctively other than it has been."

In *McCleary v. Babcock,* 82 N. E. 453, at 455 (1907), the Indiana Supreme Court defined "amend" in this style:

> "The word 'amend' is synonymous with correct, reform, and rectify. It means a correction of errors, an improvement or rectification, and necessarily implies something on which the correction, alteration, and improvement can operate. It indicates a change or modification for the better."

or modification of a certificate cannot work a basic transformation of the character of the route. If the Board contend, as evidently it does, that the permanent alteration, amendment or modification of Western's Route 13 to eliminate the Imperial Valley operation would not effect a basic transformation of the character of that route, Western is in sharp disagreement. This will be discussed later.

Western urges that two fundamental factors attach to the Board's power to alter, amend or modify a route under Section 401(h). The first is that the power can be employed only to make that particular route better, more valuable to the public, by enabling the existing air carrier to perform a more acceptable and a more convenient service. It does not include the power to make a double shift or a contingent amendment whereby one air carrier may perform more or less service so another air carrier concurrently may perform less or more service. It does not include the power indirectly to compel the transfer of all or part of a certificate from one air carrier to another air carrier. It does not include the power to compel by indirection one air carrier to abandon a route in whole or in part and allow another air carrier to serve the abandoned area or stations.

If the public no longer need service at a particular point, and for the foreseeable future will not again need that service (permanent exhaustion of a mine or permanent decommissioning of an army base, as examples), the Board should have, and does have, the power to amend that point out of the certificate. If, on the other hand, an existing community, such as El Centro, continue to have need for the existing service, the Board should not have, and does not have, the power to make a double shift

by amending the existing air carrier out and certificating a new air carrier in. This is so because the amending power under Section 401(h) does not contemplate a conditional amendment, the amending out of one air carrier conditioned on the certification in of some other air carrier. The amending power does not embrace the power to do indirectly what the Board is prohibited from doing directly—forcing the transfer in whole or in part of a certificate, forcing a merger, consolidation or acquisition of control, or forcing an abandonment of a route or segment by one air carrier in order that another air carrier may be installed.

(c) Elimination of Western's Imperial Valley Operation Would Be a Major Transformation.

Western's Route 13 covering 1039 miles runs from San Diego to Salt Lake City via Los Angeles, Las Vegas and other intermediate routes. Officially, El Centro and Yuma, as well as Palm Springs and San Bernardino, are intermediate points between San Diego and Los Angeles. In fact and in practice, San Bernardino and Palm Springs are served in the main as a separate route out of Los Angeles and El Centro and Yuma are served as a separate route out of San Diego in connection with the Los Angeles-San Diego service.[10]

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[10]The Board recognizes that the Imperial Valley operation, in fact, is a separate route, as indicated by this language which appears on page 4 of its brief:

> "Western at that time held a certificate authorizing operations over a circular route extending from San Diego to Los Angeles via El Centro, Yuma, Palm Springs, San Bernardino and Long Beach (Route No. 13). *However, Western had operated this route largely as if it were two separate routes, conducting operations* between Los Angeles-Palm Springs, and *between Los Angeles and Yuma via San Diego and El Centro,* usually on flights originating north of Los Angeles on other routes operated by Western."

If realities are ignored by labeling El Centro and Yuma as two intermediate points of minor importance, and if it were assumed, contrary to fact, that El Centro and Yuma do not need air transportation, it could be argued that their amendment or suspension out of Route 13 would not accomplish a significant transformation of the route. But to reason on this tack would be faulty in two particulars. It would reject the truth that El Centro and Yuma in effect constitute the entire Imperial Valley route and it would deny the need of El Centro and Yuma for air service, which greatly exceeds the normal population index requirements because of relative isolation, poor ground transportation and climatic conditions.

If the real facts be placed in proper perspective, the elimination of El Centro and Yuma from Western's Route 13 will be recognized not only as a basic transformation of Route 13 but also as the complete elimination of what amounts to an entire route, even though it is included under the certificate for Route 13. San Diego to Yuma by way of El Centrol involves 151 air miles. This is 100% of the San Diego-Yuma Imperial Valley route. It is 58.08% of the Los Angeles-San Diego-Yuma operation and 14.53% of the full Route 13.

United Air Lines' Route 1 extends from San Francisco (and Los Angeles) to New York, which was the original Route 1, and from Seattle to San Diego, which originally was Route 11, totalling 8199 unduplicated air miles. The San Diego-Seattle segment involving 1130 miles, is 13.78% of United's Route 1. United's north-south San Diego-Seattle operation is regional in nature and bears little resemblance to its direct San Francisco

(and Los Angeles)-New York east-west transcontinental operation.

If the amendment or suspension out of Western's Imperial Valley operation be interpreted as no more than a minor adjustment to Route 13, the Board will face no legal problems in amending out United's West Coast operation. The argument that an involuntary transfer of Western's Imperial Valley Route to Bonanza should be and can be ordered by the Board under the cloak of Section 401(h), purportedly because the service needed at El Centro essentially is feeder, could be urged just as logically and just as forcefully with respect to the amendment or suspension out of United's West Coast regional operation in favor of Western.

(d) Legislative Limitations May Not Be Judicially Enlarged.

Perhaps Congress was short-sighted in not adding to the Act a section cast in the language of the sample printed on page 9 of this brief in order that the Board could do as it seeks to do here and get along with its avowed determination to redesign the national air route pattern. Perhaps Congress should have given the Board the affirmative initiating power, rather than just the negative vetoing power, over mergers, consolidations and acquisitions of control. Possibly it would have been in the public interest had Congress empowered the Board to compel the transfer of certificates from one air carrier to another, in whole or in part, and compel one air carrier to abandon a route in whole or in part. But this lack of

wisdom on the part of Congress, be it that, cannot be corrected by the Board on its own initiative or by this Court.

Even though Section 401(h) in particular and the Civil Aeronautics Act from its four corners would permit, with a little pulling and hauling, the interpretation proclaimed by the Board in order that the Board might carry forward its redesigning and reshuffling program, the result necessarily would impale another acknowledged and clear policy of the Act, the implementation of stability in the industry. Relating to this, Mr. Justice Byrnes in *Southern S. S. Company v. National Labor Relations Board,* 316 U. S. 31, at 41 (1941), 86 L. Ed. 1246, at 1259, declared:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Act so single-mindedly that it may wholly ignore other and equally important objectives. Frequently the entire scope of legislative purposes calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its own immediate task."

A better example of the practice condemned by the Supreme Court could not be found than the one being challenged in this case. If the Board's single-minded insistence on promoting the feeder experiment, reshuffling route structures and redesigning the national air pattern be given a clearance by this Court, the instability in the air transportation industry that Congress, by the Civil Aeronautics Act, thought had been laid low will be revived in full blossom.

3. Section 1006(e) Does Not Bar Consideration by This Court of the Constitutionality of the Board's Order.

Western did not categorically charge below that the treatment it received was in violation of the Fifth Amendment of the United States Constitution. However, general argument advanced by Western preceding the original order, preceding the first reopened order and preceding the final Order now being challenged, implicitly, if not explicitly, embraced a warning that if the Board ultimately were to do what finally it did do a constitutional violation would result.

In Western's petition to the Board for reconsideration of the first reopened order, these comments appear:

> "At this point the Board is wielding a heavy club but still recognizes property rights, contract rights, personal rights, the decent treatment expected to be administered in commercial dealings and, above all else, the Constitution of the United States," (P. 8.)
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> * * * * * * *
>
> "The Court of Appeals of Texas in *Houston & North Texas Freight Lines v. Johnson,* 159 S. W. 2d 905, noted at page 907:
>
> " 'But it affixes to certificates clear and undoubted property rights, and propery rights are subject to the rule of law applicable to property rights.' " (P. 14.)
>
> * * * * * * *

"The evil, in addition to the illegality, of determining an issue in the absence of a record, may be illustrated with a couple of questions. Does Western have any ground leases at El Centro and Yuma and if so, what are the obligations and what would it cost to escape those obligations, if escapable? Does Western own the airports at Yuma and El Centro, and if so, what was Western's investment and would Western make a lease to Southwest? Did Western install any hangars or other non-removable buildings or structures at El Centro and Yuma and if so, how much did they cost? Could Western salvage any of its investment in ground facilities at El Centro and Yuma and if so, what will be the resulting profit or loss? What personnel problems would accrue to Western?" (P. 21.)

The Board was forewarned in adequate language that the Fifth Amendment was involved and had an ample opportunity to avoid the error it made. This is all that need be done to comply with Section 1006(e) of the Act.

Even though it were held that the approach to the matter taken by Western below did not constitute an urging of the point as required by the section, reasonable exculpatory grounds for the failure exist.

The original hearing before an examiner of the Board was completed on November 6, 1947. The original opinion of the Board was issued on June 15, 1949. The first reopened or supplemental opinion was dated December 19, 1949. The second reopened opinion

which is here under review is dated January 17, 1952. A petition below to reconsider the third and last Order, which came out more than four years after the original hearing had been completed, simply to call specific attention to the constitutional issue which implicitly was before the Board would have been a minor travesty on judicial process. Disinclination to prolong further a proceeding already prolonged beyond reason would appear to be a reasonable ground for the failure, if in fact it were a failure.

Beyond the technical objection urged, the constitutional argument presented by Western, firmly if briefly, has not been challenged effectively by the Board, the Intervenor or the *Amicus* parties.

It is proper to end this subject with the words of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, at 416, 67 L. Ed. 322, at 326 (1922), where he said:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . ."

Even though the Act gave the Board the power it is reaching for, and even though the activation of that power in the manner in which the Board seeks to put it in motion, were in the public interest, the safeguards provided by the Constitution may not be laid aside.

Conclusion.

To sustain the Board's Order words must be read into the Act which were not placed there by Congress. This in turn would lend judicial endorsement to the Board's single-minded self-implemented policy of shifting routes and redesigning the national air route pattern at the expense of stability in the air transportation industry.

The Order should be reversed in language that will put an end to the uncertainty attending the meaning and significance of Section 401(h) of the Act.

Los Angeles, California, April 17, 1952.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,
By HUGH W. DARLING,
Attorneys for Western Air Lines, Inc.

Certificate of Service.

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused this brief to be served upon the attorneys for Civil Aeronautics Board, Bonanza Air Lines, Inc., Southwest Airways Company, United Air Lines, Inc., Mid-West Airlines, Inc. and Wisconsin Central Airlines, Inc. by mailing three copies to each, properly addressed with postage prepaid.

Los Angeles, California, April 17, 1952.

FRANK DE MARCO, JR.

APPENDIX A.

Section 401 of the Civil Aeronautics Act.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401 [*52 Stat. 987, 49 U. S. C. 481*] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memoran-

dum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

Issuance of Certificate

(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

Existing Air Carriers

(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had

no control), the Authority, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided,* That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Authority shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

(2) If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which air-mail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the Authority shall, notwithstanding any other provision of this Act, issue certificates authorizing the transportation

of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismark, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christi, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Florida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by extension from Grand Rapids, Michigan, to Chicago, Illinois.

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign

air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority.

Effective Date and Duration of Certificate

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Authority shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Authority shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated

of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismark, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christi, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Florida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by extension from Grand Rapids, Michigan, to Chicago, Illinois.

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign

air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority.

Effective Date and Duration of Certificate

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Authority shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Authority shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated

within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Authority, or if, for a period of ninety days or such other period as may be designated by the Authority, any such service is not operated, the Authority may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

Authority to Modify, Suspend, or Revoke

(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Transfer of Certificate

(i) No certificate may be transferred unless such transfer is approved by the Authority as being consistent with the public interest.

Certain Rights Not Conferred by Certificate

(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.

Application for Abandonment

(k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Compliance With Labor Legislation

(l) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbered 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to

pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including take-off and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot or copilot.

Requirement as to Carriage of Mail

(m) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Application for New Mail Service

(n) Whenever, from time to time, the Postmaster General shall find that the needs of the Postal Service require the transportation of mail by aircraft between any points within the United States or between the United States and foreign countries, in addition to the transportation of mail authorized in certificates then currently effective, the Postmaster General shall certify such finding to the Authority and file therewith a statement showing such additional service and the facilities necessary in connection therewith, and a copy of such certification and statement shall be posted for at least twenty days in the office of the secretary of the Authority. The Authority shall, after notice and hearing, and if found by it to be required by the public convenience and necessity, make provision for such additional service, and the facilities necessary in connection therewith, by issuing a new certificate or certificates or by amending an existing certificate or certificates in accordance with the provisions of this section.

APPENDIX B.

Section 408 of the Civil Aeronautics Act.

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

Acts Prohibited

SEC. 408 [*52 Stat. 1001, 49 U. S. C. 488*] (a) It shall be unlawful unless approved by order of the Authority as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged

in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Power of Authority

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority, and thereupon the Authority shall notify the persons involved in the consolidation, merger, purchase, lease operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Authority shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competion or jeopardize another air carrier not

a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Authority shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

Interests in Ground Facilities

(c) The provisions of this section and section 409 shall not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

Jurisdiction of Accounts of Noncarriers

(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Authority to be reasonably necessary for the administration of this Act, be subject, in the same manner as if such person were an air carrier, to the provisions of this Act

relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

Investigation of Violations

(e) The Authority is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Authority finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this Act, as may be necessary, in the opinion of the Authority, to prevent further violation of such provision.